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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. 823 - 825

FRED E. HUMMEL, as Trustee in Bankruptcy of the Estate of DOROTHEA W. HUSZAGH,

Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH and FRED J. WEGG as the sole Trustee under the last Will and Testament of FREDERICK H. WICKETT, deceased,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

SIDNEY H. BLOCK,
4 S. Genesee Street,
Waukegan, Illinois,
Attorney for Petitioner.

THE DARTNELL-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Summary and Short Statement of The Matter Involved.

This case involves an Illinois trust set up by the will of a father for his daughter. The daughter is now bankrupt, and her trustee is petitioner here. Two things are true of a trust such as this in Illinois: (1) it can be conveyed by the beneficiary; (2) it cannot be seized by a judgment

creditor by means of a creditor's bill, because the Chancery Practice laws of Illinois prohibit a creditor's bill against a trust such as the one here involved.

In 1939 James R. Cardwell, a judgment creditor of Dorothea W. Huszagh, filed a Creditor's Bill in the Circuit Court of Lake County, Illinois, and by those proceedings had sold to himself, on a Master in Chancery sale, the interest of Dorothea W. Huszagh in the very sizeable trust left by Frederick H. Wickett (R. 26).

Dorothea W. Huszagh filed voluntary bankruptcy in 1940. Fred E. Hummel, petitioner here, was appointed Trustee in Bankruptcy. Hummel filed a Bill of Review in the Circuit Court of Lake County, Illinois, to set aside and have decreed null and void, the seizure of the trust which Cardwell had made by his Creditor's Bill proceedings. This petition here is a continuation of those Bill of Review proceedings by Hummel as Trustee in Bankruptcy.

The basis of the Bill of Review was that the court, in selling the trust on the Creditor's Bill brought by Cardwell, had committed Error Apparent. There is only one provision as to Creditor's Bills in the Illinois Statutes. It is contained in the chapter on Chancery Practice (Chapter 22) as Section 49. Because of its importance here it is quoted in full:

> "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a complaint against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been

created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not; * * *."

The proceedings on the Cardwell Creditor's Bill had been contrary to that statute, in that the original complaint (R. 5) the answers of both defendants (R. 9, 17) and the decree (R. 17) all showed the trust was created by Frederick H. Wickett for Dorothea W. Huszagh—precisely the type of a trust which the Supreme Court of Illinois said in this case "comes squarely under the provisions of the exception in said Section 49." (R. 129).

(The contention of Hummel that the Illinois Court was without jurisdiction to sell, in the creditor's bill proceedings, Dorothea W. Huszagh's interest in the trust, was supported by both the Appellate Court of Illinois and the Supreme Court of Illinois. Appendix 39. R. 129.)

On the trial of the Bill of Review case, evidence was heard that, after the entry of the decree in the Creditor's Bill case by which Dorothea W. Huszagh lost her trust, counsel for Cardwell and Huszagh agreed that if Cardwell would not take a deficiency against Mrs. Huszagh, no further contest would be made (R. 82). This agreement was held, by the trial court, to create an estoppel barring both Mrs. Huszagh and Fred E. Hummel, her Trustee in Bankruptcy, from setting aside the Creditor's Bill proceedings. So the trial court dismissed Hummel's Bill of Review, and also dismissed a counterclaim by Mrs. Huszagh (R. 66).

(This counterclaim of Mrs. Huszagh had been that she should be substituted as party plaintiff for her trustee in bankruptcy. She claimed a Bill of Review should lie because the trust was a spendthrift trust. Both the Appellate Court and the Supreme Court of Illinois held that as to the Huszagh counterclaim, the estoppel applied. The question of whether the trust was or was not a *spendthrift trust* was *within the jurisdiction of the court* in the earlier Cardwell proceedings, and by her agreement not to appeal from the judgment that it was not a spendthrift trust, she was estopped from complaining again that it was a spendthrift trust. Appendix 30. R. 132.)

The Appellate Court of Illinois affirmed the dismissal of Mrs. Huszagh's counterclaim, but reversed the dismissal of the Hummel Bill of Review (R. 100). That Court held the seizure by Cardwell was void, because contrary to Section 49 of Chapter 22 of the Illinois Statutes, and that the Trustee in Bankruptcy had sufficient interest to maintain the suit. The question of whether the interest in the trust was, or was not, exempt in bankruptcy was left for decision in the bankruptcy courts (Opinion in Appendix).

On appeal to the Supreme Court, that court reversed that portion of the Appellate Court's decision which sustained Hummel's Bill of Review. It affirmed the dismissal of the Huszagh counterclaim (R. 155-158).

The Supreme Court of Illinois said that since Cardwell, a judgment creditor who brought a Creditor's suit, could not have the Huszagh trust, neither could a trustee in bankruptcy. To arrive at that conclusion the Illinois Court analyzed the Federal Bankruptcy Act, and construed that Federal Act as limiting a trustee in bankruptcy, as to property which the trustee must bring a plenary suit to

reach, to the "rights, remedies, and powers of a judgment creditor, *and no more.*" (Italics ours.)

Petition for Rehearing was filed, and denied without opinion (R. 154).

It is to review the construction by the Illinois Court of the Federal Bankruptcy Act, as to the powers of a Trustee in Bankruptcy, that this petition is brought.

Statement of Jurisdictional Grounds.

This cause originated in the Circuit Court of Lake County, Illinois, and was reviewed on appeal by the Appellate Court of Illinois for the Second District, and then reviewed on appeal by the Supreme Court of Illinois. The judgment of the Supreme Court of Illinois finally dismissed all all rights of petitioner here.

The trial court filed a Preliminary (R. 54) and a Final (R. 98) Memorandum of Opinion. The opinion of the Appellate Court is reported in 323 Ill. App. 440, 55 N. E. (2d) 881, and is printed here in the Appendix. The opinion of the Supreme Court of Illinois (R. 125) is reported in 390 Ill. 526, 62 N. E. (2d) 433.

The opinion of the Supreme Court was filed and judgment was entered May 23, 1945 (R. 124) but a petition for rehearing was filed (R. 133) and it was denied and the judgment became final September 13, 1945 (R. 154). This Court, by Mr. Justice Murphy, granted on December 8, 1945 (R. 161) an extension of time within which to file this Petition, extending the time to February 11, 1946.

The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. Sec. 344 (b)). It is claimed that the decision below:

a. Denied to petitioner, acting as an officer of the Federal Court as Trustee in Bankruptcy, his title,

right and privilege conferred by Section 70 (a) of the Bankruptcy Act (11 U. S. C. Sec. 110 a) which reads as follows:

> "a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy, or of the original petition proposing an arrangement or plan held under this title, except in so far as it is to property which is held to be exempt, to all * * * (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered."

b. Denied to petitioner, acting as an officer of the Federal Court as Trustee in Bankruptcy, his title, right and privilege conferred by Section 70 (a) (6) of the Bankruptcy Act (11 U. S. C. Sec. 110 (a) (6)) which vests in the Trustee in Bankruptcy:

> "(6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property."

The denial to petitioner of the benefits of his title to that which the bankrupt could convey (Section 70a) was accomplished by ruling that the trustee only had those rights as to property in the bankrupt's possession. No such limitation is contained in the statute or in any reported case. The Supreme Court of Illinois allowed to the Trustee in Bankruptcy only those rights given by Section 70 c of the Bankruptcy Act (11 U. S. C. 110 c). Section 70 c of the Bankruptcy Act reads as follows:

> "* * * The trustee, as to all property in the pos-

session or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and, as to all other property, the trustees shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such creditor actually exists."

By refusing the Trustee the title granted by 70 a, and allowing him only the title given by 70 c, the Illinois Court denied him an explicit title given him by Federal Statute, and cut down the stature of the officer who alone can implement the broad powers of bankruptcy courts over all of the bankrupt's property, to the stature of a judgment creditor. Stated simply, the bankruptcy courts have the power of a judgment creditor, and no more. To cut down the scope of the bankruptcy administration to the level of the remedies of a judgment creditor must inevitably entail denial of some of the trustee's "title, right, privilege" under the Bankruptcy Act.

Because Cardwell had earlier seized Mrs. Huszagh's interest in the trust, some action to set aside that "unlawful taking" had to be brought. By Section 70 (a)(6) of the Bankruptcy Act (11 U. S. C. 110 (a)(6)) the sole person to start such a proceeding as this Bill of Review (a recognized method in Illinois for setting aside earlier seizures) is the Trustee in Bankruptcy. He is expressly given title to any action which arises out of "the unlawful taking" of the bankrupt's property. Were bankrupt to claim such right of action, a defense could properly be made such suit had to be by her trustee. The Illinois Court conceded the unlawfulness of the taking, but denied the Trustee in Bank-

ruptcy had any interest sufficient to sue. That denied him a right granted by the Bankruptcy Act.

Questions with reference to the right, title and interest of the Trustee under the Federal Statute were raised in Motions to Dismiss and in Answers, in the trial court (R. 35, 37, 56, 38). The trial court's memorandum of opinion ruled the trust was transferable within the meaning of 70 (a) of the Bankruptcy Act and the Trustee was the proper person to sue (R. 55).

In Illinois, the grounds of appeal and questions sought to be raised on review are required to be set forth in briefs, and it is sufficient if the errors relied on for reversals clearly appear from an examination of the entire brief. *Swain* v. *Hoberg*, 380 Ill. 442, 44 N. E. (2d) 38. It is unquestioned that both in the Appellate and Supreme Courts the briefs raised the question of the Trustee in Bankruptcy's title and rights under the Bankruptcy Act.

The Appellate Court sustained the title of the Trustee under the Bankruptcy Act without discussion (Opinion printed as Appendix to this Petition).

The Federal question was the basis of the denial of relief to the Trustee in Bankruptcy in the Supreme Court of Illinois, as appears from the following quotation, which is the entire discussion in the opinion as to the rules applied to the Trustee in Bankruptcy: (R. 130).

> "However, we cannot see that the trustee in bankruptcy is in any better position to reach Mrs. Huszagh's interest in the trust than was Cardwell, the plaintiff in the creditor's suit. The office of trustee in bankruptcy is created by the Bankruptcy Act, and his powers and the remedies he is authorized to pursue in a plenary suit are defined in such act. The appellee relies upon subsection 5 of section 70A of the Bankruptcy Act for his power and authority to reach the trust estate in this action. The said clause vests the

trustee, by operation of law, with the title of the bankrupt, except insofar as it is to property which is held to be exempt, to "property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered." Under this section, we believe the rights of the trustee in bankruptcy relate only to property which passes to him without the necessity of bringing a plenary suit to recover. It refers to property which was in the possession or control of the bankrupt at the date of the bankruptcy. In section 70C of the same act, with reference to all other property, the trustee in bankruptcy is vested with all the rights, remedies and powers of a judgment creditor, and no more.

If the protection of section 49 of the Chancery Act makes the interest of Dorothea W. Huszagh in the trust immune from any suit or lien by a creditor, surely a trustee in bankruptcy representing a creditor can have no greater or superior right. In the matter of exemptions and the interpretations of property rights, the bankruptcy courts have always regarded decisions of the State courts as controlling. (*Erie* v. *Thompson*, 304 U. S. 64.) In *Johnston* v. *Herrin*, 383 Ill. 598, we held that a contingent interest of a bankrupt is not property which the trustee in bankruptcy can recover in a plenary suit.

The trustee in bankruptcy contends that the amendment to the Bankruptcy Act in 1938 shows that property, even though it may not be subject to seizure, may pass to the trustee if it is transferable. With the exception given to exempt property in section 70A of the act and the power to acquire property through a plenary suit limited to those of a judgment creditor in section 70C, we do not construe the act to give the trustee in bankruptcy in plenary suits greater remedies in a State suit than those afforded a judgment creditor. Any other rule would be contrary to the plain language of section 70C and permit a trustee to take

property which, under the laws of Illinois, could not be taken by any other plaintiff for the payment of a debt. In *Dunham* v. *Kauffman*, 385 Ill. 79, we held that the interest of a beneficiary in a trust could not be reached by attachment. In *Baumgarden* v. *Reconstruction Finance Corp.*, 131 Fed. 2d 741, the Circuit Court of Appeals held that a trust fund which came squarely under the exception in section 49 of the Chancery Act could not be reached by garnishment. It is clear, from the holdings of this court and that of other judisdictions, that section 49 of the Chancery Act creates a rule of property and does not relate solely to procedure. (*Potter* v. *Couch*, 141 U. S. 296.) The Appellate Court erred in holding that the trustee in bankruptcy had a right to challenge the validity of the sale of the trust estate. The trial court correctly ruled that the bill of review filed by the trustee in bankruptcy should be dismissed for want of equity."

This interpretation of the Federal Statute was questioned and argued in the Petition for Rehearing, which was denied without opinion (R. 133).

Questions Presented.

1. Whether a Trustee in Bankruptcy, as to property not in the possession of the bankrupt, has only the rights of a judgment creditor holding an execution duly returned unsatisfied.

2. Whether a Trustee in Bankruptcy, as to property unlawfully taken from a bankrupt, may bring action to set aside such unlawful taking only if a judgment creditor holding an execution duly returned unsatisfied might bring such an action.

3. Did the Supreme Court of Illinois, by limiting the rights of a Trustee in Bankruptcy as to property not in the possession of the bankrupt to the rights which a judg-

ment creditor holding an execution duly returned unsatisfied might obtain by means of a Creditor's Bill, deny to petitioner the titles, rights, and privileges to bankrupt's property conferred on him by the Bankruptcy Act?

4. Did the Supreme Court of Illinois, by limiting the rights of a Trustee in Bankruptcy to the rights of a State court judgment creditor in a Creditor's Bill proceeding under the statute governing in Illinois as to practice in Creditor's Bill cases, deny to petitioner the title, right, and interest he is given by the Bankruptcy Act to bring action to set aside an unlawful taking of bankrupt's property, where the action brought by the Trustee in Bankruptcy *was not a Creditor's Bill action, but an action to set aside a transfer which was unlawful?*

Reasons for Allowance of the Writ.

1. By the Bankruptcy Act of March 2, 1867, the Act of June 8, 1872, the Act of March 3, 1873, and up to the Act of 1898, nothing came under bankruptcy administration except property which a judgment creditor could take on "levy and sale upon execution or other process or order of any court by the laws of the State—" (Revised Statutes of U. S. Gov. Pr. Office, 1875, Sections 5044, 5045). By the 1898 Act there was introduced for the first time the provision that the Trustee was vested with "property which prior to the filing of the petition he (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial process against him." That provision in substance, has continued up to now in section 70a. Under that provision, however, a weakness developed, between 1898 and 1910. The trustee could not himself claim the rights of a judgment creditor. So there were cases where the trustee could not succeed, although a judgment creditor might. This unsatisfactory condition

came to a head in *York Mfg. Co.* v. *Cassell,* 201 U. S. 344. There a lien was, by State law, good against all except judgment creditors, so the trustee was denied the right to invalidate it because none of the bankrupt's many creditors had happened to reduce their claim to judgment. To cure this weakness Congress acted, and by the Amendment of 1910 *added* what was then Section 47A(2) and is now 70C. Since the Amendment of 1910 the trustee has had not only the right by 70A to that which the bankrupt might convey, but *also* the rights of a judgment creditor. In its present ruling that 70C is the *only* right of this petitioner, the Illinois Court ignores the legislative history of the Act, and denies this petitioner the rights of *another* section of the Act. *In re Seward Dredging Co.*, 242 F. 226, 228, cer. den. 245 U. S. 651, states that since the Amendment of 1910 the trustee has two rights:

> "* * * *i.e.*, that of the bankrupt and that of such a creditor as is described (by the Amendment of 1910). They are different rights, sometimes antagonistic; the trustee can take his choice."

In *Myers* v. *Matley,* 318 U. S. 622, this court said at page 627:

> "The trustee is vested not only with the title of the bankrupt but clothed with the right of an execution creditor with a levy on the property which passes into the trustee's custody."

Petitioner claims the decision of the Illinois Court ignores the Statute, its history, and its accepted interpretation. Since the question involves the title of the trustee to property, it involves the most important sections of the bankruptcy act, one of the most vital of all Federal Statutes, and this Court has frequently granted certiorari to pass on bankruptcy act questions, where the questions are important in the administration of the Bankruptcy Act.

Sampsell v. *Imperial Paper Corp.*, 313 U. S. 215, 217; *Consolidated Rock Co.* v. *DuBois*, 312 U. S. 510, 514.

2. The Illinois Statute on Chancery Practice denies the right to seize by a creditor's bill a trust which has proceeded from a person other than the debtor (Ill. Rev. Statutes, Chap. 22, Sec. 49, *supra*). The ruling of the Supreme Court of Illinois against this petitioner relies on 70C of the Bankruptcy Act, and says: (R. 131).

> "* * * we do not construe the act (Bankruptcy Act) to give the trustee in bankruptcy in plenary suits greater remedies in a State suit than those afforded a judgment creditor."

If a trustee under an express trust must be sued in a plenary suit, whenever a trustee in bankruptcy seeks the bankrupt beneficiary's interest, as is held in *In re Baudoine*, 105 Fed. 574 and *In re Whitney*, 113 Fed. (2cd) 426, then the rule of the Illinois court makes it impossible for a trustee in bankruptcy to reach any trust in Illinois which was created by any one other than the bankrupt. For he must bring a plenary suit, and under the rule in this suit, he cannot succeed because of the practice provisions on creditor's bills. This is a highly unusual bit of judicial legislation and has the effect of making every trust created by others than the bankrupt a spendthrift trust in Illinois against a trustee in bankruptcy. It is a result, arrived at by a twisted construction of the Bankruptcy Act, doubly surprising by the fact the Supreme Court of Illinois has heretofore allowed a trustee in bankruptcy to take Illinois trusts created by persons other than the bankrupt beneficiary in the following cases: *Crane* v. *Crane*, 341 Ill. 363; *Matthern* v. *Rankin*, 228 Ill. 318; *Martin* v. *McCune*, 318 Ill. 585. None of those cases are cited or distinguished by the Supreme Court of Illinois in its opinion here, though they were argued in full in briefs of this petitioner. The Statute as to creditor's bills in Illinois is over 100 years

old and was, of course, in effect when those cases were decided. Because of the present decision the status of trusts, and whether they are, or are not, possible assets of a bankrupt's estate, is wholly an unpredictable matter in the administration of bankruptcy in Illinois. And this confusion arises not because of any interpretation of the Illinois Chancery statute, but because of the State Court's interpretation of what rights the Federal Bankruptcy Act gives a trustee in bankruptcy.

3. Statutes identical with the Illinois Statute on Chancery Practice are in existence in New Hampshire, New Jersey, Tennessee, and Washington. (Griswold, Spendthrift Trusts, 1936, p. 62.) Those five states now have the same unsettled bankruptcy administration, although no reported case from any of the five states has ever before held a trustee in bankruptcy does not succeed to the bankrupt beneficiary's assignable interest under a trust.

4. The Illinois Statute which prohibits creditor's bills against a trust such as this, does not at all effect the beneficiary's absolute right to assign his interest. *Blair* v. *Commissioner of Internal Revenue*, 300 U. S. 5, 10, ruling on an Illinois trust, and affirming the Illinois Appellate Court in *Blair* v. *Linn*, 274 Ill. App. 23, where the court said the statute:

> "is not designed to protect the trust fund from the voluntary alienation of the *cestui que trust.*"

The Illinois Supreme Court used the same language in *Binns* v. *LaForge*, 191 Ill. 598, 608. Where an interest in a trust is assignable, it passes to the trustee in bankruptcy, this court expressly held in *Hammond* v. *Whittredge*, 204 U. S. 538. Cases holding an interest in a trust passes, if assignable, to a trustee in bankruptcy, even though a judgment creditor could not take the trust are: *Horton* v. *Moore*, (6th) 110 Fed. (2d) 189, 191; *Patrick* v. *Beatty*, 202

N. C. 454, 460, 163 S. E. 572, 575; *Pollock* v. *Meyer Bros. Drug Co.*, (8th) 233 Fed. 861, 869. The effect of the present Illinois decision is to absolutely repeal Section 70a(5) of the Bankruptcy Act, which gives the trustee title to that which is assignable. Compare the Illinois interpretation of the Bankruptcy Act, with what has been the accepted view, well stated at page 869 of *Pollock* v. *Meyer Bros. Drug Co.*, *supra:*

> "The fact whether a fund or any other property of the bankrupt is subject to seizure under execution at the time bankruptcy proceedings are instituted against him is not the test whether the interest of the bankrupt in the fund or property passes to the Trustee. Under Section 70a(5) of the Bankruptcy Act (Comp. Stat. 1913, Sec. 9654), all property, which prior to the filing of the petition he could by any means have transferred, passes to the trustee. * * * There are many interests which, if owned by the bankrupt, may be of value and increase the assets of the estate, and yet not be subject to seizure on execution; but, being transferable, they will pass to the Trustee."

The Federal Courts have uniformly held that the rights of a bankruptcy trustee are *not* limited to "those afforded a judgment creditor", whether or not those rights, are asserted in a "summary" or "plenary" suit.

In *Page* v. *Edmunds*, 187 U. S. 596, the Supreme Court of Pennsylvania had held a stockbrokers seat "could not be seized in execution", yet this court held it passed to a trustee in bankruptcy, saying at page 604:

> "The bankrupt act of 1898 has made its own rule—The trustee of a bankrupt's estate is the bankrupt's assignee, and we only repeat the statute when we say that the trustee is vested with whatever the bankrupt can convey. And the statute is something more than another made of transferring property *in invitum*. It is a gift of privileges and expresses the conditions upon which they are conferred."

The Supreme Court of Illinois has in this case limited the interpretation of 70a(5), which says the trustee takes what bankrupt could assign, to that which a creditor might take. In 1924, this Court in *Board of Trade* v. *Johnson,* 264 U. S. 1 reviews *Page* v. *Edmunds, supra,* and said at page 10:

> "It declined to limit the definition of property under subdivision (5) to such as state courts might hold could be seized in execution by judicial process."

The rule that property passes to a trustee in bankruptcy, although not subject to seizure in state courts, is invariably followed in all of the several Circuit Courts of Appeals where this issue has arisen: First: *Fisher* v. *Cushman,* 103 Fed. 860, 866. Second: *In re Coleman,* 136 Fed. 818, 819; *In re Wright,* 157 Fed. 544, 546. Sixth: *O'dell* v. *Boyden,* 150 Fed. 731; *In re Baxter,* 104 Fed. (2d) 318, 320. Eighth: *In re Orear,* 178 Fed. 632, 635; *Pollock* v. *Meyer Bros. Drug Co.,* 233 Fed. 861, 869; Tenth: *In re Irwin,* 60 Fed. (2d) 495, 497.

The same rule is recognized by the text writers. Remington, Bankruptcy, Section 1192, says:

> "If it was capable either of being transferred or of being levied upon, it will pass".

5. As shown under the previous point it is unquestioned that in Illinois Mrs. Huszagh could assign her interest in the Trust. She could for example, assign it to a bank and get from the bank either a loan or the full value of the Trust. She would thus have in her hands immediately and could spend all of the property which had been placed in trust for her. For hundreds of years creditors have been barred from seizing certain trusts only on the theory that the settlor had created a trust which must be left intact to carry out the plan of settlor to provide a fund to be used through the years for the support of the object of his bounty. Where the settlor allows the trust to be defeated by the

beneficiary by anticipation or assignment of the beneficiary's interest the courts have uniformly refused to protect the trust from creditors.

This Trust contains no spendthrift language, and in Illinois it is the rule that it cannot be a spendthrift trust if there is no restriction on the powers of alienation. *Steib* v. *Whitehead*, 111 Ill. 247; *Blair* v. *Linn*, 274 Ill. App. 23.

And so the Illinois Courts have held that a trust cannot be immune from a beneficiary's creditors if the beneficiary could assign the trust. In *Hopkinson* v. *Swain*, 284 Ill. 11, the Court said on Page 23:

> "There could be no such exemption from liability for debt if the beneficiary could convey or assign the income * * *"

Since it is settled in Illinois that this trust is assignable it is apparent that the decision in this case is contrary to *Eaton* v. *Boston Safe Deposit and Trust Company*, 240 U. S. 427.

Mr. Justice Holmes, speaking for the court, said at page 428:

> "If it be true without qualification that the bankrupt could have assigned her interest and by so doing could have freed from the trust both the fund and any proceeds received by her, the argument would be very strong that the statute intended the fund to pass."

He said that:

> "there would be difficulty in admitting that a person could have property over which he could exercise all the powers of ownership except to make it liable for his debts."

The Supreme Court of Illinois is clearly in the position of saying that any beneficiary under a trust can exercise all the powers of ownership over his share of the trust, but that the property cannot be made subject to the benefici-

ary's debts. The beneficiary could of course anticipate the income or sell the corpus and take the money and pay selected creditors. But this choice is to be the beneficiary's choice. Even if the beneficiary voluntarily invokes bankruptcy and voluntarily seeks the protection of a statute which says there shall go to pay the beneficiary's debts all that the beneficiary might assign, still the Illinois Court says an assignable trust may not be used to pay debts.

It is submitted that the Illinois Supreme Court has raised one of the classic questions of the law: The question of the extent to which one may be permitted to shield property over which he has control, from the payment of his legitimate debts. The answer of the Illinois Court is that such property is shielded from creditors. It arrives at that answer by its construction of the Bankruptcy Act. It is submitted that if the bankruptcy law is to be construed as shielding from creditors property over which the debtor has absolute control, that advance (or retreat) in legal theory is so important in the administration of the bankruptcy law that a failure of this Court to review the decision would amount to an abdication of its powers.

6. The opinion of the Supreme Court of Illinois holds that whenever a trustee in bankruptcy must bring a plenary suit he has only the rights of a judgment creditor. That Court speaks of "the power to acquire property through a plenary suit limited to those of adjudgment creditor in Section 70C", and that Court says "we do not construe the act (bankruptcy act) to give the trustee in bankruptcy in plenary suits greater remedies in a State suit than those afforded a judgment creditor". (R. 131).

This suit is a bill of review proceeding brought to set aside an unlawful transfer of the bankrupt's property. A suit to recover property wrongfully taken from a debtor is never such a suit as a judgment creditor might bring.

Under the Illinois rule in this case: since a judgment creditor could not bring a plenary suit to recover property unlawfully taken from a debtor then neither could a trustee in bankruptcy ever bring such a suit. By Section 70A(6) of the Bankruptcy Act it is provided that the trustee in bankruptcy shall be vested with:

> "Rights of action arising upon contracts, or usury, or the unlawful taking or injury to his property".

If the Illinois Court's rule as to property not in the bankrupt's possession, and for which a plenary suit must be brought, is correct, then Section 70A(6) of the Bankruptcy Act imposes on the trustee the duty to bring an action *which could never succeed.*

7. If a trustee in bankruptcy can only succeed in a plenary suit brought against a property not in the possession of the bankrupt if a judgment creditor might succeed, then what of the familiar power of the trustee in bankruptcy to avoid preferences made within four months, or in some cases made within one year, of bankruptcy? Such property is always out of the possession of the bankrupt. All state courts recognize preferences as valid against a judgment creditor. This being true, how can a bankruptcy trustee ever set aside a preference, faced with the Illinois Supreme Court rule in this case that as to property not in the bankrupt's possession, the trustee "is vested with all the rights, remedies and powers of a judgment creditor, and *no more.*" (Italics ours.)

8. Bankruptcy legislation has two distinguishing characteristics: (1) the power to bring through the office of the trustee in bankruptcy all of the bankrupt's non-exempt property into a central tribunal for equitable distribution to the creditors; and (2) the power to grant to a debtor a discharge. This petition seeks a writ of certiorari to review a decision which nullifies the above first characteristic, and

makes bankruptcy administration no more effective than ordinary state court creditors proceedings. This petition seeks a review of a decision which runs contrary to the Acts which Congress has passed, and the decisions which the courts have made, all to the effect that there may be administered in bankruptcy property which a judgment creditor might not in seizure proceedings be able to reach. It is respectfully submitted that if the Amendment of 1910 which added what is now Section 70C is to be, after 35 years, realized as a limitation upon the scope of what might be administered in bankruptcy, such a startling realization needs to be forced upon the consciousness of Congress, of the commercial and legal world, and of the Courts, by the Supreme Court of the land. If, however, when Congress passed the Amendment of 1910 it intended to *add* to the powers of the trustee and not *narrow* them back to the limits which existed prior to 1898, then it is obvious that the Supreme Court of Illinois has erroneously interpreted the scope of the trustees' title and a reversal is needed to avoid confusion in the administration of the Bankruptcy Act.

9. There is no state question involved in the decision against this Petitioner. The Illinois Supreme Court ruled against the Bill of Review of the Trustee in Bankruptcy by construing the Bankruptcy Act as giving only the powers to the Trustee in this case a state judgment creditor might have; then held a judgment creditor could not seize this trust; so neither could the trustee.

The portion of the opinion which invokes the state doctrine of estoppel and consent decree, is the portion which passes on the counterclaim of Dorothea W. Huszagh. The counterclaim of Mrs. Huszagh was based on the theory the trust was a spendthrift trust, and that there was error apparent in the creditor's bill proceedings of Cardwell because of the failure of the court in the creditor's bill

proceedings to hold that it was a spendthrift trust. The Supreme Court says in its opinion:

> "The record in the case indicates that the creditor's suit in the trial court was determined on the question of whether or not the Will of Frederick H. Wickett created a spendthrift trust with Dorothea W. Huszagh as a beneficiary."

On the counterclaim of Mrs. Huszagh which raised again the spendthrift trust question, the Illinois Court held that question was within the jurisdiction of the court in the creditor's suit, and by Mrs. Huszagh's later actions, she was estopped to contest again the spendthrift trust question.

The trustee in bankruptcy, however, filed his Bill of Review on the theory that because the decree was contrary to Section 49 of Chapter 22 of the Illinois Statutes, the decree in the creditor's suit was void. Both the Appellate Court (Appendix 39) and the Supreme Court agreed with the trustee in bankruptcy as to the invalidity of the decree against such an attack (Record 130).

The decree being *void* against the trustee in bankruptcy's attack, the doctrines of consent and estoppel do not apply in Illinois. In *Thayer* v. *Village of Downers Grove*, 369 Ill. 334 (cited with approval by both the Appellate and Supreme Courts in this case) the court said:

> "It is a rule well established that a void judgment or decree may be vacated at any time and the doctrines of laches and estoppel do not apply."

The Creditor's suit decree having been entered contrary to the Illinois Statute, then on the Trustee's attack based on the statute, the rule from *Armstrong* v. *Obucino*, 300 Ill. 141, (cited with approval by both the Appellate and Supreme Courts in this case) applies:

> "Where a court, after acquiring jurisdiction, has

> assumed to enter a decree for a sale which goes beyond the limits of the jurisdiction and transgresses the law the decree is void, and the sale based thereon is likewise an absolute nullity. (16 R.C.L. 7.) One of the essentials of a valid judgment is that the court have jurisdiction to render that particular judgment."

Such a void judgment cannot be cured by consent. *Mansfield* v. *Mansfield*, 203 Ill. 92, 98. And this is true "even if there is an agreement that a decree shall be executed as entered." *Hotel Building Corp.* v. *Dunlop Hotel Co.*, 350 Ill. 451, 458.

Since in Illinois neither consent nor estoppel protect a decree where an attack is made which shows (as here) a sale contrary to a statute, it is obvious the portion of the Illinois Supreme Court opinion which treats of consent and estoppel applies only to the counterclaim on the non-jurisdictional and non-statutory spendthrift trust question of Mrs. Huszagh. That the Illinois courts did not intend to dispose of the Trustee in Bankruptcy's rights on that non-federal question is made compellingly evident by reading both the Appellate and Supreme Court opinions. Both separate carefully the suit of the Trustee, and the counterclaim of Mrs. Huszagh. Both apply the non-federal questions only to defeat her counterclaim.

It is submitted, therefore, this petitioner was denied relief solely on the interpretation of his rights, titles and duties under the Bankruptcy Act. In fact the Illinois Court opens the portion of the opinion which disposes of this petitioner's case by saying:

> "The office of trustee in bankruptcy is created by the Bankruptcy Act, and his powers and the remedies he is authorized to pursue in a plenary suit are defined in such act."

It ends up by saying:

> "The Appellate Court erred in holding that the

trustee in bankruptcy had a right to challenge the validity of the sale of the trust estate. The trial court correctly ruled that the bill of review filed by the trustee in bankruptcy should be dismissed for want of equity."

Where the decision is solely on Federal questions against the Petitioner, the State Court decides those questions contrary to the rulings of this and the lower Federal Courts, and the question relates to the vital bankruptcy administration question of the title and rights of the trustee, a proper case for review is presented, this court held in *Hammond* v. *Whittredge*, 204 U. S. 538, 547.

Conclusion.

This is a continuation of one suit, the Bill of Review brought by Fred E. Hummel, as Trustee in Bankruptcy. From the decision on that suit by the Appellate Court, three appeals were taken, by the three defendants. These appeals were docketed in the Supreme Court of Illinois as 28301, 28302, 28303. They were there consolidated (R. 105). The Supreme Court of Illinois rendered identical judgments in cases 28301, 28302 and 28303 (R. 155, 157, 158). This Petitioner, in filing this Petition, seeks a review of the decision of the Illinois Supreme Court, which is common to all three docketed appeals there (R. 124). The respondents to this Petition are necessarily the same, whether 28301, 28302 or 28303 are involved. Petitioner seeks a Writ of Certiorari against each judgment as docketed in the Supreme Court of Illinois, and a hearing here, as there, on a consolidated case.

Wherefore, your Petitioner respectfully prays that Writs of Certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Illinois, commanding said Court to certify to this Court the

record in the cases all entitled *"Fred E. Hummel, as Trustee in Bankruptcy of the Estate of Dorothea W. Huszagh,* v. *James R. Cardwell, Dorothea W. Huszagh, and Fred J. Wegg, as the sole Trustee under the Last Will and Testament of Frederick H. Wickett, deceased"* and originally docketed in the Illinois Supreme Court as numbers 28301, 28302, and 28303, and there consolidated, in order that the decision and judgment of said court in cases numbered there 28301, 28302, and 28303 may be reviewed by this Court, the judgments reversed, and that Petitioner may be granted such other and further relief as may seem proper, including, but not limited to a consolidation for hearing and judgment purposes in this Court.

Respectfully submitted,

SIDNEY H. BLOCK,
Attorney for Petitioner.

APPENDIX.

OPINION OF THE APPELLATE COURT.

Fred E. Hummel, Trustee, Appellant, v. James R. Cardwell et al., Appellees.

Gen. No. 9,936.

MR. JUSTICE WOLFE delivered the opinion of the court.

The appellant, Fred E. Hummel, is the trustee in bankruptcy of the estate of Dorothea W. Huszagh, who is a beneficiary under a trust, created by the last will of her father, Frederick H. Wickett, deceased. Dorothea W. Huszagh filed her petition to be adjudged a bankrupt on August 17, 1940. In her bankruptcy schedules she stated that under a creditor's bill proceeding, in the circuit court of Lake county, her interest and estate in the trust had been sold by the master in chancery under a decree of sale entered on November 17, 1939, to her judgment creditor, James R. Cardwell.

Hummel was appointed trustee in bankruptcy on October 24, 1940. On November 15, 1940, he filed in the circuit court of Lake county, his complaint (bill of review) against James R. Cardwell, Dorothea W. Huszagh, and also Fred J. Wegg as the sole trustee under the will of Frederick H. Wickett, to review the proceedings and decree in the creditor's suit. The defendants filed their respective answers to the complaint and Dorothea W. Huszagh also filed a counterclaim. After a hearing before the chancellor, both the complaint and the counterclaim were dismissed as being without equity. From this decree Hummel has appealed.

All of the defendants have filed cross-appeals resulting in a diversity of contentions being vigorously urged in this court by the different parties to the suit.

The creditor's bill of the defendant, James R. Cardwell, is governed by the provisions of section 49 of the Chancery Act (sec. 49, ch. 22, Ill. Rev. Stat. 1943; Jones Ill. Stats. Ann. 106.12), which is as follows: "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a complaint against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceeding in chancery, whether the same were originally liable to be taken in execution at law or not; Provided that no answer made to any complaint filed under this and the preceding section shall be read in evidence against the defendant on the trial of any indictment for fraud charged in the complaint."

As heretofore stated the decree of sale directed the master in chancery to sell all the right, title and interest of Dorothea W. Huszagh in the trust estate created by the will of Frederick H. Wickett. This decree was a determin-

ation that such interest was subject to sale under a creditor's bill. At the time the creditor's bill was filed and when the decree of sale thereunder was entered, she had no interest, benefit or property given to her by the will, except such interest and estate as came to her as a *cestui que trust*. The claim of the judgment creditor, Cardwell, that as the purchaser of her title and interest in and to the trust estate under the decree of sale entered on November 17, 1939, necessarily rests on the validity of that decree, as now opposed to the claim of Hummel, that Dorothea W. Huszagh's interests and estates in the trust passed to him, as trustee in bankruptcy, upon the filing of her petition in bankruptcy. The validity of the decree of sale is vital to the claim of Cardwell and to the contention of the testamentary trustee, Wegg, that Cardwell's claim is prior or superior to the claim of the trustee in bankruptcy. It is the duty of this court to decide whether the circuit court had jurisdiction of the subject-matter of the suit based on the creditor's bill which is now brought into review. If the decree of sale is void owing to the circuit court's lack of jurisdiction to render such a decree, nothing was presented for review, except the validity of the decree of sale.

The will of Frederick H. Wickett provides for the payment of his debts and makes specific bequests, which are not necessary to consider in construing his will. The residue of his estate, the testator devises and bequeaths to Fred J. Wegg (and Norman M. Hancock who refused to act) in trust for uses and purposes set forth in the will. The will provides that if one of the trustees refused to act the one accepting the trusteeship should have all the powers given to the two trustees. The trustees are given full power and absolute control of the residuary estate, to manage and dispose of it, or any part thereof, as they deem best. They are empowered to sell, assign or exchange, invest and reinvest, any and all of said property at such time

and prices as they see fit. The proceeds of such sales to become part of the trust estate and subject to the terms of the trust.

The tenth clause of the will is as follows: "My said trustees are directed to pay out of the net income of this trust estate to my wife, Alice W. Wickett, for and during the term of her natural life the sum of Fifteen Hundred Dollars ($1500.00) per month. In the event that said net income is not sufficient to pay my wife the sum of Fifteen Hundred Dollars ($1500.00) per month, then I direct my said trustees to pay such deficiency out of the corpus of this trust estate as may be necessary to secure to my said wife an income of not less than Fifteen Hundred ($1500.00) dollars per month. I expressly authorize and empower my said trustees to pay to my said wife, either out of income or out of the corpus of my estate, such further and other sum or sums of money, from time to time, as in their judgment shall seem fit, having in mind the needs and requirements of my wife."

The eleventh clause of the will is as follows: "Upon the death of my said wife, my said trustees are directed to pay the net annual income of my said trust estate, in such instalments as in their judgment shall seem best, equally to my children, Dorothy Huszagh and Marjorie Huszagh, share and share alike. My said trustees are, however, expressly authorized and empowered to pay over and deliver to my said children, Dorothy Huszagh and Marjorie Huszagh, from time to time, as in their judgment shall seem fit, such further or other portion of the corpus of this trust estate; Provided, however, that at all times both my said children shall be treated equally, so far as the division of said trust estate is concerned."

The fifteenth clause of the will is as follows: "I hereby expressly authorize and empower my trustees from time to

time to pay any part of the corpus of this trust estate to any of my relatives if, in the opinion of my said trustees, they may be in want or need of assistance."

Alice W. Wickett, the widow of the testator, renounced the provisions of the will for her benefit. The legal title and possession of the testator's estate relinquished by her renunciation, with other residuary assets of his estate as provided by the will, passed to the trustee, Wegg, as part of the trust estate. (*Dunshee* v. *Dunshee*, 251 Ill. 405.) The will does not provide that Dorothea W. Huszagh survive her mother to be entitled to the net income from the trust estate. Under the eleventh clause of the will the trustees are directed to pay the "net annual income" of the trust estate to the two daughters, Dorothea W. Huszagh and Marjorie Huszagh, equally. It is necessary to refer to the pleadings and the decree of sale in the creditor's suit to determine the contention of Dorothea Huszagh and Wegg, the testamentary trustee, and the contention of Cardwell.

It is contended by Dorothea Huszagh and Wegg that the trust created by the will of Frederick H. Wickett is a Spendthrift Trust. In her answer to the creditor's bill of Cardwell, Dorothea Huszagh alleged that the trust is in the nature of a Spendthrift Trust and not subject to any legal or equitable assignment, by operation of law, or otherwise, and that the plaintiff (Cardwell), is not entitled to have such interest in the trust sold for the purpose of having the proceeds of the sale thereof, applied in satisfaction of his judgment. In the decree ordering the sale of Dorothea Huszagh's interest in the trust, the court decided her interest in the trust estate, constitutes personal property, which did create a trust, but not a Spendthrift Trust, and that her interest in the trust is subject to equitable attachment and sale for the purpose of satisfying, in whole or part, as the case may be, the unpaid judgment in favor of Cardwell. The

circuit court had jurisdiction of the parties and the subject-matter of the trust bearing on the questions as to whether the trust was a Spendthrift Trust. The court decided that the trust is not a Spendthrift Trust. The court having had jurisdiction, it is immaterial whether its judgment was erroneous, since the judgment is binding on the parties and on every court, unless reversed or annulled in a direct proceeding. This finding or judgment of the court is not subject to collateral attack. (*Wood* v. *First Nat. Bank of Woodlawn*, 383 Ill. 515.) It is also to be noted that the finding that the trust was not a Spendthrift Trust was entered at the insistence of Cardwell and in his favor, and that Dorothea W. Huszagh, after the decree of sale was entered, agreed with Cardwell that she would not file a bill of review to question the proceedings taken in the creditor's suit. Neither of these parties is now in a position to question the soundness of the finding that the trust is not a Spendthrift Trust. (*Harrigan* v. *County of Peoria*, 262 Ill. 36, 43.)

In the trial court the creditor's suit turned solely on the question whether the trust was a Spendthrift Trust, and the chancellor having found that it was not, ordered the sale of Dorothea Huszagh's interest in the trust sold to satisfy the unpaid judgment of Cardwell, as above stated. In her answer to the creditor's bill, Dorothea W. Huszagh also alleged: "The entire consideration for said trust estate was derived from the estate of the late father of this defendant, and this defendant did not contribute anything to the assets of said trust estate, and that, as a matter of law, and as a matter of equity and good conscience, it was intended by the late father of this defendant, as appears from his said will, whatever interest this defendant had in said trust estate should not be subject to any attachment, legal or equitable." This part of the answer was probably understood by the chancellor, on the

hearing thereof, as, in effect, an allegation that the trust was a Spendthrift Trust. It appears from the record that the chancellor at that time was not informed of the provision of section 49 of the Chancery Act, excepting property held in trust for a defendant to a creditor's bill, from an equitable lien in favor of his judgment debtor.

It is contended by Hummel (trustee in bankruptcy) the plaintiff in the bill of review, that the circuit court did not have jurisdiction to enter a decree of sale of Dorothea W. Huszagh's interest in and to the trust because it is in contravention of the exception of section 49 of the statutes.

After Hummel as trustee, etc., filed his petition for a bill of review, James R. Cardwell on November 15, 1940, filed a motion to strike the same. On December 13, 1940, Cardwell filed an amended motion to dismiss the complaint. One of the reasons in support of his motion to dismiss is as follows: "The right, title and interest of Dorothea W. Huszagh in said trust, is under and by virtue of section 49, chapter 22, of the Illinois Revised Statute exempt property and cannot be reached by the creditors of Dorothea W. Huszagh, and by reason thereof, no interest passed to Fred E. Hummel as trustee, by reason of the adjudication of said Dorothea W. Huszagh as a bankrupt." In the motion to strike the same reason was given. Both of said motions were sworn to. In the answer of James R. Cardwell filed to the complaint for review in, "Affirmative defenses," he states: "Dorothea W. Huszagh did not set up or in any wise refer to the provision of section 49, chapter 22 of the Revised Statute as a defense to the creditor's bill in case No. 40999."

On December 20, 1940, the defendant, Wegg as trustee in said estate, filed his motion to dismiss the complaint for review. One of the reasons given in his motion is: "The sub-

ject-matter, subject to be reviewed was an interest that Dorothea W. Huszagh had, under the last will and testament of Frederick H. Wickett, deceased, and was not subject to attack by any creditor or person representing any creditor of Dorothea W. Huszagh under the terms of section 49, chapter 22 of the Revised Statute of Illinois." This motion was sworn to.

On February 17, 1941, the defendant, Dorothea W. Huszagh, filed her answer and counterclaim. Paragraph 5 of the answer is: "The allegations contained in paragraph 10 of the answer filed by Dorothea W. Huszagh in said case No. 40999, is that the entire consideration for said trust estate was derived from the estate of the late father of this defendant, and this defendant did not contribute anything to the assets of the said trust estate, and that, as a matter of law, and as a matter of equity and good conscience, it was intended by the late father of this defendant, as appears from his said will, that whatever interest this defendant had in said trust estate should not be subject to any attachment, legal or equitable,—are true, and are admitted in the record; there is no dispute regarding the language of the will of Fred H. Wickett, creating said trust estate, or in regard to any facts set forth verbatim in the answer of Dorothea W. Huszagh filed in case No. 40999." From an examination of the motions, and the answers of James R. Cardwell and Dorothea W. Huszagh, it is clear that the defendants in the bill for review, were relying upon the fact that the trust fund now in question was exempt property under the statute, and that the trustee in bankruptcy was not entiled to maintain his suit to recover the same.

As before stated, in the original creditor's bill suit it was claimed in the answer filed by Dorothea W. Huszagh that all of the trust estate was exempt property, because it was derived from the estate of her father, and that she did

not contribute anything to the assets of said trust estate, and that the same was not subject to any attachment, legal or otherwise. This answer was filed on November 4, 1939. On November 10, 1939, James R. Cardwell served a notice on the attorney for the defendant, Dorothea W. Huszagh, in which it is stated that James R. Cardwell, in view of the fact set forth in the answer of the above named defendants to the complaint filed herein, and in view of the fact that the principal controversy between the parties was based on questions of law, etc., would ask the court to set the cause for immediate hearing. The case was heard on November 17, 1939.

A part of subsection 2 of section 40 of the Illinois Practice Act, Smith-Hurd's Ann. Stats. (Jones Ill. Stats. Ann. 104.040), is as follows: "Every allegation, except the allegation of damages, not explicitly denied, shall be deemed to be admitted, etc." This statute applies to new matter raised by answer as well as in the original pleadings, or amendments thereto. The plaintiff saw fit to go to trial without filing a reply, or denying these material allegations of fact set forth in the answer to the creditor's bill, which was a complete defense to his suit, and therefore he has admitted all such facts well pleaded. We are aware that some courts have held that by going to trial without filing a reply to the new matter, in some instances this rule would not apply, but our attention has been called to no case that will change the rule or the statute, where the plaintiff, before his time has expired under the statute, or rule of court to file a reply, *has demanded a hearing on the pleadings in the case.*

It is stated in *Watt* v. *Cecil*, 368 Ill. 510, at page 517: "In an unbroken sequence from *DeWolf* v. *Long*, 2 Gilm. 679, to *Headen* v. *Cohn*, 292 Ill. 210, this court has repeatedly held that where no replication is filed and the cause

is tried upon bill and answer, the answer is taken as true. * * * *It cannot be seriously contended that the Civil Practice Act, with its more specific requirements, relaxes the rule.*"

In the decree of the creditor's bill suit, the court found: "The interest of Dorothea W. Huszagh in said trust estate constitutes personal property of an equitable nature predicated upon the terms of said will of Frederick H. Wickett, deceased, which did not create a trust in the nature of a spend-thrift trust." The will of Frederick H. Wickett is a part of the record in this case. That part of the will which creates a trust in favor of Dorothea W. Huszagh is clear and unambiguous and shows that the father created a trust in favor of his daughter, Dorothea, wholly out of assets of his own estate.

During the trial of the present case, the court filed a memoranda opinion which is incorporated in the record of the case. It is as follows: "It is apparent on the face of the decree entered in the original suit,—in fact, there can be no other conclusion,—that said decree erroneously, as a matter of law, subjected to sale a trust estate that was specifically protected from any such sale by the very terms of the statute on which the proceeding itself was based. Without question it is apparent on the face of the decree that in entering such decree this court erroneously misapplied the law applicable to the admitted and undisputed facts.

"While not necessary or material to this decision, we cannot refrain from saying, and believe we should so advise the attorneys, that the statute (sec. 49, ch. 22) is so specific and plain in its terms that as a conclusion of law it is difficult to understand how this court could have intelligently or consistently entered such final decree, or to understand how the attorney for the plaintiff could have

consistently asked for or obtained the entry of any such decree, or to understand how, considering the large amount of money involved, the attorneys for the defendants could have consistently permitted any such decree to stand without having the same reviewed by appeal or otherwise, without even having filed a certificate of evidence, if there was in fact any evidence.

"As a matter of fact (although perhaps not apparent on the record) it is apparent that this court was imposed upon by not being advised of the law. The court believes it now has the power to and should correct the error."

From the pleadings in the creditor's bill suit, the findings of fact by the court in the decree, the facts stated by the defendants in their motion to strike and dismiss the suit in the present case, the answers filed by Cardwell and Mrs. Huszagh, and the memoranda opinion of the chancellor, it is clear that any presumption that the court heard evidence concerning Dorothea W. Huszagh's contribution to the trust in question, or that the court found that she had so contributed, is overcome. We determine and find that no such evidence was heard.

To meet this contention of Hummel, the judgment creditor, Cardwell, contends that the court did have jurisdiction to order the sale of Dorothea's interest in the trust, and such order, although it may be erroneous, is not subject to review, by a bill of review; also, that if it be decided that the court did not have jurisdiction to enter the decree of sale, that there was an equitable assignment by Dorothea W. Huszagh of her interest in the trust to Cardwell; further, that Dorothea W. Huszagh and her trustee in bankruptcy are estopped to urge the question of jurisdiction, of the circuit court to enter the decree of sale.

From an examination of the evidence as abstracted, we cannot agree with the contention of the appellee that there

was an equitable assignment of her interest in the trust fund to Cardwell, or that the trustee in bankruptcy is estopped from questioning the jurisdiction of the circuit court to enter the decree of sale in the creditor's bill.

It has been frequently stated that where a court has once acquired jurisdiction of the parties and the subject-matter of the suit, its judgment or decree, however erroneous, can be attacked only on appeal, or writ of error. This, no doubt, is a correct statement of the law, but it is subject to a well known exception, *viz.;* that the court must have jurisdiction and authority to render such decree or judgment. In the case of *McInness* v. *Wilson Printing Co.,* 258 Ill. App. 161, this court had occasion to pass upon the question whether a decision of the industrial commission in granting a minor compensation, when the minor was employed in violation of the Child Labor Law, could be attacked in a collateral proceeding. This court speaking through Mr. Justice JONES, on page 167 of the opinion, uses this language: "It is well settled that a void judgment may be collaterally impeached in another proceeding by anyone with whose rights or interests it conflicts. The statement has been frequently made that where a court has jurisdiction of the parties and the subject-matter, its decree, however erroneous, can only be attacked on appeal or error; but the rule is subject to an exception equally well established,—that a decree may be void because the court exceeded its jurisdiction. Courts are limited in the extent and character of their judgments, and if they transcend their lawful powers their judgments and decrees are void and may be collaterally impeached wherever rights claimed under them are brought in question. The doctrine that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its jurisdiction or decree cannot be collaterally assailed, is only correct where

the court proceeds according to established modes governing the class to which the case belongs, and does not transcend, in the extent and character of its judgment or decree, the law or statute which is applied to it. One of the essentials of a valid judgment is that the court have jurisdiction to render that particular judgment. (*Armstrong* v. *Obucino,* 300 Ill. 140.) The proceedings of the industrial commission partake of the nature of judicial proceedings (*Nega* v. *Chicago Rys. Co.,* 317 Ill. 482), and the same rules of law are applicable to their awards as are applied to judgments and decrees of courts." The *Armstrong* v. *Obucino* case, *supra,* has been cited with approval numerous times, both by our Appellate and the Supreme Court.

Armstrong v. *Obucino, supra,* is reviewed in the case of *Wood* v. *First Nat. Bank of Woodlawn,* 383 Ill. 515, and it is there stated: "The *Armstrong* case was an action under the Mechanic's Lien Act to declare a lien in favor of the plaintiff for material which had been used in the improvement of defendant's property pursuant to a contract. The decree fixed the amount due and directed the master in chancery to sell if the same was not paid. The sale was to be made subject to redemption and the decree set forth the details as to the sale and right of redemption according to the statute as it existed prior to July 1, 1917. The act under which the sale was directed had been amended in 1917 and the decree directed a sale contrary to the provisions of such amendment. It was held that the sale and all the proceedings following it were void, and this was necessarily so for the reason that the jurisdiction of the court to direct a sale and prescribe its terms was provided by statute and the court had no jurisdiction to enter a decree which transcended the statutory provisions."

In *Hubbell* v. *Canady,* 58 Ill. 425, the right of homestead was involved which had not been released according to stat-

ute, and had been sold under a decree of court. The judgment was never appealed from, and a bill in equity was filed to set aside the sale. The court held that the former judgment and sale were void and could be questioned, either in a direct, or collateral attack, as the court exceeded its jurisdiction by rendering such a decree of sale.

In the case of *Wiggins* v. *Chance*, 54 Ill. 175, it was held: Where premises occupied as a homestead are of value not exceeding one thousand dollars, they are not subject to levy and sale under execution against the owner, and should the premises thus situated be sold under such process, and there being no redemption, and a sheriff's deed made to the purchaser, no title will pass thereby, and the sale would be void. To the same effect is *Van Winkle* v. *Weston*, 276 Ill. App. 66; *Klosowski* v. *Klosowski*, 266 Ill. 360; *Sheahan* v. *Madigan*, 275 Ill. 372; *Voss* v. *Rezgis*, 343 Ill. 451; *Holterman* v. *Poynter*, 361 Ill. 617; *Imhok* v. *Lipe*, 162 Ill. 282; *Binns* v. *La Forge*, 191 Ill. 598. There is a clear statement of the law in *Thayer* v. *Village of Downers Grove*, 369 Ill. 334 to-wit: "It is the rule, as frequently stated by this court, that a judgment or order of confirmation of an assessment cannot be set aside after the term at which it is rendered, nor after the expiration of thirty days following the entry thereof. (*Village of Dolton* v. *Dolton Estate*, 331 Ill. 88; *Noonan* v. *Thompson*, 231 id. 588; *McChesney* v. *City of Chicago*, 161 id. 110.) There are two exceptions, however, to this rule; one is where the court was without jurisdiction to render the judgment entered, and the other is where the judgment was obtained by fraud. (*Village of Dolton* v. *Dolton Estate, supra.*) Where the court entering the judgment has exceeded its jurisdiction and such judgment or decree transcends the statute conferring jurisdiction on the court, such judgment or decree is void and may be collaterally impeached or set aside on motion after the

time for review by appeal has expired. (*Gray* v. *Black Co.*, 338 Ill. 488; *City of Belvidere* v. *Iles*, 330 id. 31; *People* v. *Brewer*, 328 id. 472; *Armstrong* v. *Obucino*, 300 id. 140.) It is a rule well established that a void judgment or order may be vacated at any time and the doctrine of laches and estoppel do not apply. Jurisdiction in a particular case is not only the power of the court to hear and determine it, but also the power to render the particular judgment entered, and every act of the court beyond its jurisdiction is void. *People* v. *Shurtleff*, 355 Ill. 210; *People* v. *Circuit Court of Washington County*, 347 id. 34; *People* v. *Siman*, 284 id. 28; *Ex Parte Reed*, 100 U. S. 13, 25 L. ed. 538."

In the case of *Binns* v. *La Forge*, 191 Ill. 598, the court in deciding that a trust fund, created similar to Mrs. Huszagh's cannot be reached by a creditor's bill, stated that when such a trust in good faith, has been created, or the fund so held in trust proceeded from some person, other than the defendant himself, is expressly excepted from the property which may be reached by a creditor's bill. The trust fund in this case having proceeded from a person other than Dorothea W. Huszagh falls within the law and spirit of the statute, and is protected. The trust thus created rests in a large part on the ground that the creditor is not defrauded, and therefore has no cause of complaint, because the owner of the property, in the free exercise of his will so disposed of it, that the object of his bounty, who has parted with nothing in return, has sufficient income to provide for her support during life. As to whether the trustee in bankruptcy is entitled to the trust fund, we express no opinion, as that is a matter to be determined by the bankruptcy court.

It is our conclusion that the trial court did not have jurisdiction or authority to render a decree for the sale of Dorothea W. Huszagh's trust fund, which was created for

her benefit, by her father's will, and that said decree is null and void, and that James R. Cardwell took nothing at the sale of the same. The trustee in bankruptcy has a right to challenge the validity of the sale of the trust estate.

That part of the decree which dismissed the counterclaim of Dorothea W. Huszagh is affirmed. The decree dismissing the petition for a bill of review is reversed and the cause remanded to the circuit court of Lake county, with directions to vacate and set aside its decree of sale entered November 17, 1939, and also the decree of December 15, 1939, which approved the report of sale, and to restore Dorothea W. Huszagh to her former status and condition under her father's will, as though the former decrees had not been rendered.

Affirmed in part, reversed in part with directions.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, Justus L. Johnson, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of July, in the year of our Lord one thousand nine hundred and forty-four.

JUSTUS L. JOHNSON,
Clerk of the Appellate Court.

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Summary of Argument.

The Illinois Supreme Court passed on a question of fact as to whether or not the transaction between Dorothea W. Huszagh and Cardwell constituted a valid agreement, and decided that it did. Such agreement having been executed more than four months prior to bankruptcy, no federal question is involved.

The availability of bankrupt's trust income to his Trustee in Bankruptcy is determined by the law of the situs of the trust. The interpretation of property rights rests in the decision of the State courts and those decisions are controlling.

Where the decisions of a State court might have been either on a State ground or a Federal ground and the State ground is sufficient to sustain the judgment, the Supreme Court will not grant review even if the Federal law is erroneously interpreted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1945

No. 823

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF DOROTHEA W. HUSZAGH,

Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH AND FRED J. WEGG, AS THE SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED,

Respondents.

BRIEF OF FRED J. WEGG, AS SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED, ONE OF THE RESPONDENTS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION BELOW.

The opinion below is reported in 390 Illinois Supreme Court Reports at Page 526. No opinion of the Illinois Supreme Court is attached to the petition. The substitution of the Appellate Court opinion, as an appendix to the petition is improper.

STATEMENT MAKING AGAINST JURISDICTION.

The case at bar was decided by the Illinois Supreme Court on a mixed question of fact and law, as to which it determined that the decree entered in the creditor's bill proceeding was in fact and in law a consent decree; the same having been fully implemented by the parties thereto, the matter was *res adjudicata* more than four months prior to bankruptcy and under the Illinois law no party thereto can have said decree vacated or set aside.

Such proceedings having been concluded, and the interest of Dorothea Huszagh conveyed by the consent decree and the Master's sale and assignment more than four months prior to the intervention of bankruptcy, and no claim of fraud or concealment being charged, the Trustee in Bankruptcy cannot be heard with respect to such transfer.

No federal question of law was necessarily involved in the hearing and determination of that issue.

No substantial or important question of law is presented by this record.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This respondent adds the following to correct and complete the petitioner's "Summary and Short Statement of the Matter Involved."

(a) The decree in the original creditor's bill (Rec. 17-23) proceeding adjudicated the rights of this respondent, Fred J. Wegg, as Trustee under the Will of Frederick H. Wickett, Deceased, and Dorothea Huszagh, one of the beneficiaries under said trust, with respect to important matters of accounting between them;

(b) Said decree found that Dorothea Huszagh was indebted to Wegg, Trustee, in the sum of approximately fifty thousand dollars ($50,000.00) as security for which he had the right to withhold distribution of income from said trust which might otherwise be due the said Dorothea Huszagh;

(c) Said decree was *res adjudicata* as to all parties thereto for more than four months prior to intervention of bankruptcy;

(d) Said petitioner, in his bill of review, recognized that rights in said property interest of Dorothea Huszagh may have attached by reason of the sale pursuant to the decree in the creditor's bill proceeding because he prayed, in the alternative (Rec. 31), for a money judgment against Cardwell in the event that Cardwell had conveyed or assigned interest acquired by him under said decree;

(e) Said petitioner alleged no facts entitling him to set aside the accounting between Dorothea Huszagh and Wegg, as trustee, had in said creditor's bill decree, and in no way attacked said accounting;

(f) Dorothea Huszagh in her counterclaim for review did not attack the accounting between her and Wegg, trustee, stated in said creditor's bill decree, and said accounting was *res adjudicata* between all of the parties to the creditor's suit, including Cardwell, more than ten months prior to bankruptcy.

(g) The Illinois Supreme Court (Rec. 154) held that it was not necessary for it to pass on the appeal of Wegg, trustee, from the Appellate Court regarding the accounting, because it ordered the decree of the trial court in the bill of review case affirmed.

(h) No question of fraud or collusion in connection with said creditor's bill proceeding was raised by the peti-

tioner. To the contrary, he denied in open court (Rec. 87) that any such question was presented;

(i) On the trial of the bill of review case the trial court heard evidence and found (Rec. 67) that Dorothea Huszagh, for a good and valuable consideration paid to her by Cardwell, agreed that she would not take any further action concerning the decree entered in the creditor's bill proceeding;

(j) The Supreme Court found (Rec. 153) as a *matter of fact* that there was such a valid agreement between Dorothea Huszagh and Cardwell; that Cardwell could not be placed in *status quo* and, therefore, Dorothea Huszagh is now estopped from litigating the questions involved in the bill of review case;

(k) Contrary to petitioner's statement, the Appellate Court did *not* sustain the title of the trustee under the Bankruptcy Act. In fact, it expressly refused to pass on this question. (Rec. 121.)

THE QUESTION PRESENTED.

The basic question presented to the Supreme Court of Illinois was whether or not Dorothea Huszagh could relitigate the effect of a decree as to which she had contracted away her rights for a valid consideration, and as to this, the Illinois Supreme Court determined that she was estopped. This matter having transpired more than four months prior to the filing of bankruptcy by her and there being no claim of fraud, the case left no federal question for determination.

PROPOSITIONS OF LAW.

If property is not in Bankruptcy Court's possession and a third person asserts a bona fide claim adverse to the Trustee in Bankruptcy, his rights must be determined in a plenary action.

Cline v. *Kaplan,* 323 U. S. 97.

In re Baudouine, 101 Fed. 574 (2nd Cir. Ct. N. Y. 1900).

In such plenary action the interpretation of property rights (particularly when based upon the express terms of a State Statute) rests in the decisions of the State Courts and those decisions are controlling.

Erie v. *Thompson,* 304 U. S. page 64.

Potter v. *Couch,* 141 U. S. 296.

Where the decision of a State Court might have been either on a State ground or a Federal ground, and the State ground is sufficient to sustain the judgment, the Supreme Court will not grant review, even if the Federal law is erroneously interpreted.

Williams v. *Kaiser,* 323 U. S. 471; 65 S. Ct. 363 (367).

Radio Station WOW v. *Johnson;* 65 S. Ct. 1475, 1480; 89 Law Ed. Sup. Ct. Rep. 1397, 1402; 324 U. S. (Number 3 June 18, 1945 page III).

The Illinois Supreme Court passed on the question of fact as to whether or not the transaction between Dorothea Huszagh and Cardwell constituted a valid agreement, and gave effect to the same according to the laws of Illinois. Such agreement having been executed more than four months prior to bankruptcy and there being no claim of fraud, no Federal question is involved.

Blair v. *Brailey,* 221 Fed. 1 (Cir. Ct. 5th Cir. certiorari denied 238 U. S. 638).

The availability of bankrupt's trust income to his Trustee in Bankruptcy is to be determined by the law of the situs of the trust, and the Trustee must bring a plenary action authorized by state law against the party holding an adverse interest, which is the Trustee under the will.

Lockwood v. *Exchange Bank,* 190 U. S. 294.

ARGUMENT.

The petitioner proceeds on the premise that the interest of Dorothea Huszagh under the trust created by her father's will had not been changed or altered by any conduct of her own; as though there had been no intervention of the Cardwell proceeding, and her agreement with Cardwell concerning the transfer of her interest by her consent to the implementation of the decree of the Lake County Circuit Court.

Even assuming that there had been no intervention of creditor's bill litigation or voluntary agreements based on valid considerations, we submit that the federal courts would follow the decisions of the Illinois Supreme Court concerning the "property rights" which the Trustee in Bankruptcy might have in her interest in said trust.

The "property" sought to be reached by the Trustee in Bankruptcy was neither in the actual or constructive possession of the bankrupt nor in the actual or constructive possession of the Bankruptcy Court. *Blair* v. *Brailey*, 221 Fed. 1 (Cert. denied 238 U. S. 638). To bring this property into the Bankruptcy Court, where it could adjudicate the same under the Bankruptcy Act, it would have been necessary to institute litigation.

That litigation would have required the Trustee to go into a state court in a plenary action. (*Cline* v. *Kaplan*, 323 U. S. 97.) When he arrives in the state court he comes there endowed only with the specific rights and powers granted him by the state law and the Bankruptcy Act. Upon his arrival in a plenary action, he would have been faced with the obstacle set up by Section 49, Chapter

22 of the Illinois Revised Statutes, and the decisions of the State courts construing that Statute have consistently been upheld by the decisions of the United States Supreme Court. (*Potter* v. *Couch*, 141 U. S. 296; *Spindle* v. *Shreve*, 111 U. S. 542.) It has not even been a question of conflicting views, the Supreme Court of the United States properly giving effect to the decisions of the courts of last review of the State which is the situs of the property concerning the rights, limitations and immunities of such property.

It is specious for the petitioner to beg the question he seeks to argue, (his petition, page 19) that if the Illinois court's rule as to property not in the bankrupt's possession, and for which a plenary suit must be brought, is correct, then Section 70-C of the Bankruptcy Act imposes on the Trustee the duty to bring an action which could never succeed. Here the Court is presented with a *particular* type of case in which he cannot succeed, and it is only as to this specific situation that the Court is called upon to consider whether he can succeed and not whether any Trustee in any different case ever can succeed in plenary action.

It will not be contended that the United States Supreme Court will take jurisdiction of a cause to sit in judgment upon the correctness of decisions of the Supreme Court of Illinois with respect to property rights which had been conveyed or disposed of, either by voluntary action or by processes of law more than four months prior to the intervention of bankruptcy, and where, as in this case, no question of fraud is involved.

There has been no contrariety of opinion either by State or Federal decisions on the question of the limitations of Section 49 of our Chancery Act establishing a rule of property, and in these circumstances it is not to be presumed that what the legislature had established as a

rule of property creating immunities of trust interests of this nature when attacked by an individual creditor in his own right, would or should be waived or surrendered, and the immunity destroyed simply because the attack is made by a Trustee in Bankruptcy. The limitation and the protection of the statute is attached to the property and not to the nature or character of the particular plaintiff who seeks to reach that property in satisfaction of debt. Every basis of public policy, responsible in the first instance, for the enactment of this legislation must be considered as granting the property interest itself an immunity; and it must follow as a natural corollary that the matter of who may be the plaintiff in a given situation should be of no consequence. The Trustee in Bankruptcy is just as much subject to the public policy of the State of Illinois as an individual creditor. *Lockwood* v. *Exchange Bank,* 190 U. S. 294. To seek to make a federal question out of a matter which is peculiarly within the rights of a State, simply because the person raising the question is an officer under the Federal Bankruptcy Act, is to ask this Court to intervene in a sphere it has consistently refused to invade.

Petitioner seeks to convey the impression that the Illinois Supreme Court has gone counter to its previous decisions in similar cases and cites Illinois cases (petition, page 13) to an effect contrary to that given in this case—and complains that the Court ignored its previous decisions and thus attempts to establish that our Illinois courts are now dubious about the questions involved. The Supreme Court of Illinois properly ignored the cases cited by the petitioner because those cases had no applicability to the situation at hand. Heretofore, counsel for the petitioner vigorously urged them in his own briefs before that Court. In none of those cases was the Chancery Act involved or even raised; in one of the cases there was no trust; in the second, the trust had terminated; and in the third, the beneficiary of the trust brought his interest into the

Bankruptcy Court by scheduling the same in his own schedules.

The petition for certiorari attempts to induce the impression that in the State courts the only question raised concerned the title of the Trustee in Bankruptcy, and therefor it decided a Federal question. Quite to the contrary, the principal question raised was whether or not the creditor's bill proceedings was *res adjudicata;* whether or not, by reason of the contract between Cardwell and Dorothea Huszagh, the latter was estopped from raising the issue. All this having transpired more than four months before the intervention of bankruptcy, it was necessary for the court to make a decision on this issue *before* the court would have any occasion to consider any rights of the Trustee in Bankruptcy. For it must be obvious that if the Court decided the former questions it would have no occasion to even consider the latter question.

And this is precisely what the trial court, as well as the Illinois Supreme Court, did do. The memorandum opinion of the trial Court on the possible title of the Trustee was rendered on motions to strike and before the trial Court had heard any evidence; the final decree, (Rec. 66-67) from which review was sought, having decided that the previous matter was *res adjudicata,* was binding on Cardwell, Dorothea Huszagh and this respondent and found it unnecessary (and properly so) to pass on the latter question. For that reason, also, we respectfully submit, the Illinois Supreme Court, in affirming the Circuit Court on that question, did all that was necessary to finally conclude the litigation. Its discussion of the rights of the Trustee in Bankruptcy was merely dicta. It also may be noted that the final opinion rendered by the trial court in the bill of review case (Rec. 98) and the only notice of appeal filed by the trustee in bankruptcy (Rec. 68-69) showed that no question of bankruptcy law was decided by the

trial court in entering its decree (Rec. 66-67) dismissing for want of equity the trustee in bankruptcy's bill of review. The judgment of the Illinois Supreme Court affirming the decree of the trial court was not predicated on a broader basis than the decree of the trial court.

The Supreme Court will not review a decision of a state court until it affirmatively appears that a federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Supreme Court will not undertake to review it. *Williams* v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 363 (367). And this is so even if the State Court has erroneously interpreted the Federal law. *Radio Station WOW* v. *Johnson*, 324 U. S. (No. 3 Opinion June 18, 1945) 65 S. Ct. 1475 (1480). *Herb* v. *Pitcairn*, 324 U. S. 117, 65 S. Ct. 459 (463).

The United States Supreme Court does not grant the writ of certiorari upon the mere ground that a part of the reasoning of the opinion of the lower court is doubtful although the result is correct. *Tyrrell* v. *District of Columbia*, 243 U. S. 1.

Petitioner seeks to make much of the fact that Dorothea Huszagh's interest was assignable by her and, therefore, it passed to her Trustee in Bankruptcy. The manifest inapplicability of the conclusion to the premise can be demonstrated as follows:

(a) Dorothea Huszagh, for a good and valuable consideration, and more than four months prior to the intervention of bankruptcy, sold her interest to a stranger. Obviously in such circumstances petitioner will not claim that the Trustee in Bankruptcy would have any right to this interest; or

(b) Dorothea Huszagh lost her interest in the trust by a judicial proceeding more than four months prior to the intervention of bankruptcy. Obviously in this situation also her Trustee in Bankruptcy would have no interest; and

(c) Dorothea Huszagh is estopped by reason of a contract based on a valid consideration from seeking to rescind the loss of her interest, and the matter is *res adjudicata* as to her, and had been for more than four months prior to the intervention of bankruptcy. The Illinois Supreme Court has so ruled in a situation in which it must be admitted that the *lex situs* applies. It must be equally obvious that the Trustee in Bankruptcy cannot claim that a federal question is involved simply because he is a Trustee in Bankruptcy.

To Recapitulate:

1. Ten months prior to the intervention of bankruptcy Dorothea Huszagh became divested of her interest in the trust under the will of her father, and this respondent became bound by findings in the decree concerning matters of accounting;

2. The Illinois Supreme Court has held on a mixed question of law and fact that all matters in said action became and were *res adjudicata* more than four months prior to the intervention of the bankruptcy;

3. To ask this Honorable Court to take jurisdiction on the ground that a federal question is involved *merely* through the intervention of bankruptcy more than four months after the transpiration of events, is to ask this Court to exercise a right of review over judicial proceedings and contractual relationships, the determination of which is solely within the purview of the laws of the situs and the State courts having jurisdiction thereof;

4. Every consideration of the facts and the law which warranted the Illinois Supreme Court in finding that Dorothea Huszagh is estopped from having the Cardwell decree vacated (as to which question it will not be denied that the Illinois Supreme Court decision will be respected) must by the same token be definitive of the rights of the Trustee in Bankruptcy where more than four months had elapsed before the filing of the bankruptcy proceedings. This Court will not grant certiorari to review evidence with respect to which the Illinois Supreme Court has made specific findings.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this is not a proper case for review by certiorari and that the petition for such writ should be denied.

Respectfully submitted,

M. MANNING MARCUS,
Attorney for Fred J. Wegg, as the sole Trustee under the last Will and Testament of Frederick H. Wickett, deceased, one of the Respondents.

BARRE BLUMENTHAL,
Of Counsel.

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IN THE

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OCTOBER TERM, A. D. 1945

No. 823

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF DOROTHEA W. HUSZAGH,

Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH AND FRED J. WEGG, AS THE SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED,

Respondents.

BRIEF OF DOROTHEA W. HUSZAGH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

MAURICE P. GOLDEN,
100 West Monroe Street,
Chicago, Illinois,
Attorney for the Respondent,
Dorothea W. Huszagh.

EDWARD G. BERGLUND,
Of Counsel,
1 North LaSalle Street,
Chicago, Illinois.

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Respondents.

BRIEF OF DOROTHEA W. HUSZAGH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION BELOW.

The opinion below is reported in 390 Illinois Supreme Court Reports at page 526 (advance sheets, 390 Ill. No. 6).

STATEMENT MAKING AGAINST JURISDICTION.

The petitioner improperly substituted a copy of the second opinion of the Illinois Appellate Court in place of

the opinion of the Illinois Supreme Court required by the rules of this court as a part of his petition.

No federal question of law was involved in the matter of the determination by the state trial court and state Supreme Court that consent decrees entered in a creditor's suit, sought to be attacked collaterally, and solely on the ground of a mistake of state law, were, as a matter of state law, *res adjudicata,* more than four months before the filing of a petition in bankruptcy.

The petitioner filed three petitions for certiorari as cases numbered 823, 824 and 825, but he served only one single printed copy bearing all of said numbers on such single copy on counsel for Dorothea W. Huszagh, who has filed in each of said cases her brief in opposition to each of said petitions. The briefs filed on behalf of Mrs. Huszagh are identical, except that the appropriate case numbers are printed on each of the 40 copies filed in this court in regard to each of the three cases. The petitioner, without notice, obtained an extension giving him the maximum time allowed by law to file his petitions for certiorari and serve respondents. At no time has he served this respondent with a copy of the record in any of the cases, although more than twenty days beyond the maximum period of five months since the entry of the judgment of the state Supreme Court have elapsed. It is submitted that petitioner's failure to serve respondents with a copy of the petition and the record filed in each case within the maximum time allowed by statute and rules of this court is, of itself, sufficient ground to deny each of petitioner's petitions.

The only question necessarily involved in the decision made by the state Supreme Court was whether, as a matter of state law, a consent decree can be attacked by a party to such decree solely on the ground of an alleged mistake of law. The bankruptcy act does not purport to grant to

a trustee in bankruptcy any right to attack, on the ground of a mere mistake in state law, a decree of a state court which had become, according to state law, *res adjudicata* more than four months prior to bankruptcy.

The state Supreme Court, in holding that no bill of review would lie either at the instance of the petitioner or at the instance of the counterclaimant, Mrs. Huszagh (the former bankrupt), to set aside the decrees, found as a matter of fact that the decrees were consent decrees and also that for a valuable consideration Mrs. Huszagh, more than four months prior to bankruptcy, had compromised and settled all matters in litigation with Cardwell (judgment creditor) and had agreed not to litigate further any matters pertaining to the creditor's bill proceeding in which the decrees sought to be attacked collaterally were entered.

There is no substantial or important question of law presented by the record. The entire issue below, as far as each of three petitions for certiorari are concerned, is a question of fact in a single case as to whether the decrees sought to be attacked were consent decrees and if, for a valuable consideration, Mrs. Huszagh more than four months prior to bankruptcy had agreed not to file a bill of review. With regard to the facts mentioned, the findings of the trial court were confirmed by the state Supreme Court and this court does not grant certiorari to review findings of fact or to weigh evidence.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner's "Summary Statement of Matter Involved" is inaccurate and insufficient.

Cardwell, having obtained a judgment on personal service against Mrs. Huszagh, and having execution returned *nulla bona*, filed his creditor's bill in the Circuit Court of

Lake County, Illinois, against Mrs. Huszagh and Fred J. Wegg, as trustee under the last will of Frederick H. Wickett, deceased, who was the late father of Mrs. Huszagh. Under the will of Frederick H. Wickett, deceased, a trust estate was created for the support and maintenance of Mrs. Huszagh, a widow, her six minor children and her sister.

In the creditor's bill suit a decree was entered on November 17, 1939 (Rec. 17-23), which found and adjudicated that the court had heard evidence, had jurisdiction over the parties and the subject matter of the suit; that her interest in the trust estate created by her father's will was subject to sale in order to pay Cardwell's judgment. At the time that decree was entered, there was no other judgment against Mrs. Huszagh and no possible question of bankruptcy law was passed on by the state trial court in entering its decree in the creditor's bill suit, more than ten months prior to bankruptcy.

Seven days after the entry of that decree and within term time, during which the Illinois court had a right to vacate the decree on its motion or on motion of counsel, Mrs. Huszagh, with the advice of her attorney, made and entered into an agreement with Cardwell (Rec. 81-88) pursuant to which for a valuable consideration she agreed that the decree of sale entered in the creditor's suit be carried out according to its intent, which required a sale of Mrs. Huszagh's beneficial interest in the trust at public vendue, and that Mrs. Huszagh would not litigate the matters involved in the creditor's suit further and, in particular, that she would not take an appeal or file a bill of review to attack the decree. Upon advertisement, the sale was carried out, a report of sale was made to the court and, by agreement between the attorneys for Mrs. Huszagh and Cardwell, the judgment creditor, the report of sale was approved ten months before bankruptcy.

In his agreement with Mrs. Huszagh, Cardwell agreed to satisfy the judgment he had obtained at law in another case, irrespective of the amount realized at the master's sale; that if there was an overplus at the master's sale, it would go to Mrs. Huszagh; that Cardwell, in any event, would pay the costs of the proceeding, including master's fees, commissions and expenses (Rec. 81-88). The agreement between Mrs. Huszagh and Cardwell was fully executed (see Opinion of trial court (Rec. 98) and final decree of trial court in bill of review case (Rec. 66-67), and Opinion of Illinois Supreme Court in regard to which having not been served with a copy of the record we cannot cite by the page).

After the entry of the decree approving the master's report of sale in the creditor's suit, a deficiency decree was entered in another case against Mrs. Huszagh with regard to a bond issue (Rec. 77) which she had signed fifteen years ago as an accommodation maker, and such deficiency decree was the only basis of the claim filed in her bankruptcy proceeding.

The petitioner, as the trustee in bankruptcy, a few days less than a year after the decree of sale had been entered in the creditor's suit, filed his bill of review in the Circuit Court of Lake County, Illinois, against Mrs. Huszagh, Cardwell and Fred J. Wegg, as trustee under the will creating the trust, seeking to set aside the two decrees in the creditor's suit solely on the ground that such decrees were entered as a matter of mistake of law because they countervened the provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes.

The state trial court (Rec. 66-67) and state Supreme Court held that no bill of review would lie to set aside consent decrees on the ground of a mistake of law; that Mrs. Huszagh and the petitioner claiming through her, after the lapse of more than four months, were estopped

from maintaining a bill of review by the agreement Mrs. Huszagh made with Cardwell. The opinion of trial court in bill of review case shows that no question of bankruptcy law was involved (Rec. 98) and the decree of the trial court in the case last mentioned does likewise (Rec. 66-67). The state Supreme Court affirmed this decree.

The decree of sale in the creditor's suit is of vital interest to Mrs. Huszagh because it adjudicated (Rec. 17-23) the account between her and Fred J. Wegg, as trustee under her late father's will. According to the will of Mrs. Huszagh's late father, Fred J. Wegg, trustee (Rec. 15), is authorized to give any part of the trust estate to any relative in need, which would include any or all of the six minor children of Mrs. Huszagh. In another suit to construe the will of Mrs. Huszagh's father, the trustee in bankruptcy, although he has not established any right to take the beneficial interest formerly owned by Mrs. Huszagh in the trust estate, has taken what counsel for this respondent regards as a hostile attitude to the rights of Mrs. Huszagh's children. The pendency of another suit is *de hors* of the record in this case, and although it exists in fact it may be treated in this brief only as a possibility in this case. With these facts mentioned, any attack on Mrs. Huszagh for opposing, as she is entitled to do by law (*In re Barnett*, 124 F. (2d) 1005), the three petitions for certiorari filed, more readily may be shown to be immaterial to the consideration of the merits of petitioner's petitions, which must be based on the record herein.

ARGUMENT.

The cross-complaint for review of Mrs. Huszagh, seeking to set aside the decrees in the creditor's bill suit, was predicated (Rec. 43) upon the theory that her interest in the active trust estate created by the last will of her late father for her support and benefit was a spendthrift trust, and being a spendthrift trust Mrs. Huszagh could make no agreement relating to her interest which would operate as a transfer of her interest to Cardwell. At no time in the state court proceedings did Mrs. Huszagh in any way seek to repudiate the agreement which she made and entered into with Cardwell, wherein for a valuable consideration she agreed not to contest further the matters involved in the creditor's suit and, in particular (Rec. 82), not to file a bill of review. The only ground urged by her is although she made such an agreement for a valuable consideration, such agreement pertained to an interest in a spendthrift trust, which she could not transfer or in any wise alienate by her own agreement. If such contention were not correct, then her counsel does not dispute the rule of law well established in Illinois and in federal courts to the effect that a bill of review does not lie to impeach a consent decree. *Harding* v. *Harding*, 198 U. S. 317. The only ground upon which the controlling effect of this rule of law would not be applicable to the facts in the case at bar is on the ground that the nature of Mrs. Huszagh's interest in the trust estate was such that she was not competent to make a contract concerning it.

The trial court (Rec. 66 and 98) and the state Supreme Court, and its opinion, (since the petitioner never served a copy of the record on this respondent, our reference to

state Supreme Court's opinion cannot cite the record page of such opinion) specifically found that the interest was of a character concerning which Mrs. Huszagh was competent to make a contract and that she was bound by her agreement. The Appellate Court of Illinois found that Mrs. Huszagh was bound by her agreement, but held that her trustee in bankruptcy, although more than four months had elapsed since the time of the making of her agreement and the filing of her petition in bankruptcy, was not bound by such agreement. The agreement, according to Illinois law, when made in term time (*Bushnell* v. *Cooper*, 289 Ill. 260, 267), if binding on Mrs. Huszagh made the decree in the creditor's suit sought to be attacked a consent decree, and made the decree *res adjudicata* more than four months before the filing of a petition in bankruptcy. (*Hempstead* v. *Broad*, 275 Ill. 358, 365.) It is anomaly in legal theory for a court to hold that an agreement is legally binding on the parties to the agreement but not on a party claiming after the lapse of more than four months thru one of the parties to such an agreement when the good faith of the agreement is admitted (Rec. 87). There is no provision of the bankruptcy law which, after the lapse of four months, entitles the trustee in bankruptcy to nullify a bona fide agreement which the court finds was legal and valid, and still binding on the parties to such agreement. A decree in a non-bankruptcy court, predicated on the validity of a lien arising before the four months' period, is *res adjudicata* in a bankruptcy court or in a plenary suit filed by the trustee in bankruptcy in the state court.

On behalf of Mrs. Huszagh it is contended that the express provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes, as repeatedly construed by the Illinois Supreme Court and the United State Supreme Court create a rule of property and not merely a rule of procedure; (*Potter* v. *Couch*, 141 U. S. 296, 319; *Spindle* v. *Shreve*, 111 U. S. 543, 548) that the effect of that statute, which

has been in force continuously since 1845, was to make any active trust created in good faith by a resident of Illinois for the support and maintenance of another not subject to the payment of the debts of the beneficiary. This is clearly shown in the recent decision of *Knight* v. *Gregory*, 389 Ill. 554, 561, construing the statute in question. In the case last mentioned, the state Supreme Court stated that the interest of the beneficiary in a trust of the character mentioned, by virtue of the provisions of the Illinois statute, is just as exempt from the payment of debts of a beneficiary as is an interest in a typical so-called spendthrift trust.

The effect of the Illinois statute has been stated by the author in 119 A. L. R. 41 as follows:

> "* * * the effect of the statute appears to be to make all trusts, except those for the benefit of the settlor, spendthrift trusts as against creditors of the beneficiary."

The petitioner ignoring the nature of his bill of review as a collateral attack and assuming that he is trying the merits of the creditor's suit *de novo*, contends that the decision of the Illinois Supreme Court "is contary to *Eaton* v. *Boston Safe Deposit and Trust Company*, 240 U. S. 427." This case has been cited by this respondent in support of the decision of the Illinois Supreme Court because Justice Holmes stated at pages 428, 429, in the court's opinion that:

> "It is established law in Massachusetts that such trusts are valid and effective against creditors, *Broadway National Bank* v. *Adams*, 133 Massachusetts, 170, and, subject to what we are about to say, against assignees in insolvency or trustees in bankruptcy. *Billings* v. *Marsh*, 153 Massachusetts, 311. *Munroe* v. *Dewey*, 176 Massachusetts, 184. The trustee in bankruptcy seeks to avoid the effect of these decisions on the ground that Mrs. Luke's equitable life interest was held by the Supreme Court of the State to be assign-

able, and that therefore it passed under § 70a (5) of the Bankruptcy Act, vesting in the trustee all property that the bankrupt 'could by any means have transferred.' The Supreme Judicial Court, however, held that the above cited cases governed and that the property did not pass. 220 Massachusetts, 484.

* * *

"The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it. *Dunn* v. *Dobson*, 198 Massachusetts, 142, 146. *Lathrop* v. *Merrill*, 207 Massachusetts, 6, 9. Whatever may have been the criticisms upon the policy and soundness of the doctrine, and whatever may be the power of this court to weigh the reasoning upon which it has been established by the Massachusetts cases, *Page* v. *Edmunds*, 187 U. S. 596, 602, it has been established too long and is too nearly sanctioned by the decisions of this court to be overthrown here. *Nichols* v. *Eaton*, 91 U. S. 716. *Shelton* v. *King*, 229 U. S. 90, 99. The policy of the Bankruptcy Act is to respect state exemptions, and until the Massachusetts decisions shall have gone farther than they yet have we are not prepared to say that the present bequest is not protected by the Massachusetts rule."

The petitioner refers in his petition not to what was the actual decision of this court in the case last mentioned, which affirmed the judgment of the Massachusetts Supreme Court, but he quotes a part of the discussion in the opinion which is in no wise applicable to the case at bar and which might relate to a case in which the bankrupt "could have freed from the trust *both the fund* and any proceeds received by her." In the case at bar, no one contends that Mrs. Huszagh "could have assigned her interest and by so doing could have freed from the trust *both the fund* and any proceeds received by her." According to the will of her late father (Rec. 15) creating the trust, Mrs. Huszagh's interest in the trust was a contingent interest, dependent not only upon her

continuing life but also dependent upon whether the trustee under the will would give away the corpus to a relative of the testator in need. Under the terms of her father's will, never could Mrs. Huszagh have freed the fund from the trust. Furthermore, in the case at bar the Illinois Supreme Court determined that the proper construction of Section 49 of Chapter 22 of the Illinois Revised Statutes "as limiting the character of the equitable property and inherent in it" with regard to the equitable interest of Mrs. Huszagh in the trust created by her late father's will. This court follows the construction of a state statute as made by the state Supreme Court.

As stated at page 946 of Collier's Bankruptcy, Vol. 4 (14th Edition):

> "The courts are frequently moved to reassert the general rule that the act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or his creditors at the time the trustee's title accrues."

The petitioner contends that the decision of the Illinois Supreme Court to the effect that Mrs. Huszagh was estopped by her agreement made with Cardwell ten months before bankruptcy was correct in so far it relates to Mrs. Huszagh, and, therefore, he cannot contend logically that he derived any right under Section 70a(5) from Mrs. Huszagh who had bargained away her right ten months before bankruptcy. The only right, if any, which would be left to the petitioner was the right similar to that of a judgment creditor under Section 70c of the bankruptcy act. However, the petitioner also contends that a judgment creditor in Illinois has no right to subject the former interest of Mrs. Huszagh to the payment of a judgment; and he, therefore, disclaims any rights under Section 70c of the bankruptcy act. Having no rights to maintain an adverse plenary suit against Wegg, as trustee under the

will, or against Cardwell, or Mrs. Huszagh, who has received her discharge in bankruptcy (Rec. 96) under Section 70c, and since Mrs. Huszagh had no title to her interest in the trust to give the petitioner at the time she filed her petition in bankruptcy, the Illinois Supreme Court was right in holding that the petitioner had no right to maintain his bill of review.

The discussion which the Illinois Supreme Court made in its opinion of the bankruptcy act was not the basis of its judgment, which held that under the state law a consent decree made ten months before bankruptcy could not be set aside on the sole ground of an alleged error of law. The opinion of any court is not broader than the facts in a particular case in which it is rendered. However, it is submitted, the scope of section 70c of the bankruptcy act was correctly delineated in the opinion of the Illinois Supreme Court.

The purpose of Section 70c is set forth in a note prepared by its draftsmen—and appearing at 45 Cong. Rec. 2277 (1910). (Reproduced in Collier, 14th Ed., Vol. 4, page 1252, as follows:)

> " 'The proposed amendment, while correcting the defect named, (secret liens) at the same time carefully guards the rights of all parties. It is evident that in the proposed amendment attempt is made to give effect to two ideas, quite distinct: First, that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under state law; and, second, that *as to property not in the custody of the bankruptcy court, the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an individual creditor might have done to subject assets. In this way, in effect, proceedings in bankruptcy will give to creditors the same rights that*

creditors under the state law would have had had there been no bankruptcy, and from which they are debarred by the bankruptcy—certainly a very desirable and eminently fair position to be granted to the trustee.' 45 Cong. Rec. 2277 (1910)." (Matter in parenthesis and italics added.)

The state Supreme Court, in applying Section 70c with respect to the trust interest of Mrs. Huszagh did just as the draftsmen intended. The court decided that "in effect, proceedings in bankruptcy will give to creditors the same rights that creditors under the state law would have had had there been no bankruptcy, * * *." Petitioner not only concedes, but, in fact, he predicated his bill of review on the sole premise that because of the effect of Section 49 of Chapter 22 of the Illinois Revised Statutes no creditor in Illinois could subject the interest of Mrs. Huszagh in the trust to the payment of a judgment.

It would create an anomalous situation fraught with many difficulties to mix indiscriminately the matter of remedies with the matter of property rights, with avowed intention of cutting down a bankrupt's property rights under state statutes and decisions by giving to the trustee in bankruptcy greater remedies as plaintiff in a plenary suit filed by him in the state court than would be afforded any other plaintiff of any kind or description whatsoever, with the net result that an interest in a trust estate, which under the Illinois laws could not be taken for the payment of a debt, could be taken in a plenary suit for the payment of a debt only by a trustee in bankruptcy. It always has been the policy of Congress in enacting all bankruptcy laws to respect property rights created by state law. In such states as recognize the validity of spendthrift trusts, the courts recognize the particular character or property right of such interest and will not permit the trustee in bankruptcy to recover it. The property right given to the beneficiary in a trust within the purview of

Section 49 of the Illinois Chancery Act is just as sacred in contemplation of the bankruptcy law as would be the same right if it were merely defined categorically in the instrument creating the trust, as immune from liability to pay debts. Under the laws of the State of Illinois, it is just as free from liability to pay debts as an interest in a trust specifically characterized in the instrument creating the trust, as a property right free from any liability to pay the debts of the beneficiary. (*Knight* v. *Gregory*, 389 Ill. 554, 561.) The will of Mrs. Huszagh's father creating the trust must be read in contemplation of the then existing Section 49 of Chapter 22 of the Illinois Revised Statutes to the same extent as if the testator quoted the statute last mentioned in his will.

The petitioner cannot argue properly that the interest of a beneficiary in a spendthrift trust, or any trust created in good faith by a person other than the beneficiary made just as immune from the attacks of a creditor as a spendthrift trust by virtue of the public policy of the State of Illinois as evidenced by Section 49 of Chapter 22 of the Illinois Revised Statutes, can be taken, administered and sold by a trustee in bankruptcy of the beneficiary. There is no basis in the bankruptcy law for discrimination between interests in trusts of the character just mentioned, which have the common characteristic of not being subject to be taken for a debt of the beneficiary. If there were any difference, the stronger case is made for the trust within the purview of the state statute. Furthermore, such a question was not presented by the facts in the case at bar to the Illinois Supreme Court, which held that the consent decrees in the creditor's suit could not be attacked collaterally for a mistake of law after the lapse of four months before bankruptcy. The primary question before the Illinois Supreme Court was the validity of the consent decrees attacked collaterally. The petitioner argues his case in his petition as if he were trying the creditor's suit

de novo in his bill of review, which he cannot do according to the judgment of the Illinois Supreme Court.

The United States Supreme Court, in the matter of construing the force and effect of Section 49 of Chapter 22 of the Illinois Revised Statutes, follows the decision of the Illinois Supreme Court. (*Erie* v. *Thompson,* 304 U. S. 64; *Page* v. *Edmunds,* 187 U. S. 596, 602.)

In any case, the question of the availability of a bankrupt's trust income to the trustee in bankruptcy is to be determined by the law of the situs of the trust, and the trustee must bring a plenary action authorized by the state law against the party holding an adverse interest and the trustee of the trust estate. (*Cline* v. *Kaplan,* 323 U. S. 97; *In re Baudouine,* 101 Fed. 574; *In re Whitney,* 113 F. (2d) 426, 428, 429). In the case last mentioned, the Circuit Court of Appeals of the Second Circuit stated at pages 428-9 of its opinion:

> "* * * The interest of a *cestui* in a trust is not like an interest in a stock exchange seat. * * *
>
> "The property in the hands of the Fiduciary Trust Company was not in the actual or constructive possession of the bankruptcy court. That company was an adverse claimant entitled to litigate its claims in the prior state court suit without interference from the bankruptcy court."

In the case of *In re Allee,* 55 F. (2d) 76, at page 77, the Circuit Court of Appeals stated:

> "This court has held that such trustee (in bankruptcy) is not to be considered as a purchaser for value, but that his powers, rights, and title are the same as any other judgment creditor, who holds a returned and unsatisfied execution, and that he cannot in any case take property not belonging to the bankrupt."

In *Cline* v. *Kaplan,* 323 U. S. 97, in an opinion by Justice Frankfurter, this court stated in its opinion:

> "If the property is not in the court's possession and a third party asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated in suits of the ordinary character, with the rights and remedies incident thereto."

Suits of "an ordinary character and with the rights and remedies incident thereto" would not sanction the granting of relief to a trustee in bankruptcy as the plaintiff in a state plenary suit not available to any other plaintiff in any other case in such state court.

Nearly all property of a bankrupt not subject to the claims of creditors can be transferred or in some manner alienated by him. The United States Supreme Court will not construe the state statute to give an interest in a trust, within the statute, a different character, not inherent in it. The right of homestead, rights to insurance in favor of widows, and the like, can be released by the bankrupt, but the trustee in bankruptcy cannot claim them under Section 70a(5) of the bankruptcy act as property which the bankrupt by any means could have transferred, in case where the state statute makes such interests immune from the claims of creditors. There are a number of so-called "rights" of a bankrupt which more than four months prior to bankruptcy the judgment debtor could compromise, settle or alienate, in good faith, for a valuable consideration, which do not pass to a trustee in bankruptcy. It has been held that since a creditor under state law cannot avoid the assignment of mere expectancy, his trustee in bankruptcy cannot do so. (*In re Barnett*, 124 F. (2d) 1005) (2nd Cir. Ct. of Appeals.) The mere expectancy could not be taken for the payment of a debt at the time it was assigned, and at a later date although the expectancy changed, the trustee in bankruptcy could not set aside the assignment.

A contingent attorney's fee not fully earned is not property which passes to the trustee in bankruptcy, although

the court held that it was assignable, or could be compromised or released. (*In re Coleman, Attorney*, 87 F. (2d) 753.) The fee of a trustee is not fully earned until the estate is closed, and does not pass to the trustee in bankruptcy. (*In re Furness*, 75 F. (2d) 965) (2nd Cir. Ct. of Appeals.)

The petitioner contends that Mrs. Huszagh could have assigned her interest in the trust created by her father's will and, therefore, it "passed" to the trustee in bankruptcy. However, the flaw in his argument is obvious because the interest was in Cardwell more than ten months before bankruptcy and did not pass from Cardwell to the trustee in bankruptcy when Mrs. Huszagh filed her voluntary petition in bankruptcy. Furthermore, if Mrs. Huszagh could assign or transfer her interest, there is no basis for the contention that by virtue of her agreement with Cardwell, which she had a right to make, with the advice of her counsel, according to the Illinois Supreme Court, she did not transfer. (*Hudnall* v. *Ham*, 183 Ill. 486.) If her interest were to any extent transferable and were not an interest in a typical spendthrift trust, she could make by contract a consent decree just as well as she could make a bill of sale or other written assignment. (*King* v. *King*, 215 Ill. 100, 115, 119.) However, in the case at bar. Mrs. Huszagh could not transfer any right to the trust *res* (see Will, Rec. 12-15) within the dictum of *Eaton* v. *Boston Safe Deposit and Trust Company*, 240 U. S. 427. The case at bar is stronger against the petitioner than the actual decision of the Court in the case last mentioned, because in the case at bar the state Supreme Court construed the effect of an Illinois statute as effecting the immunity or particular character of the interest of Mrs. Huszagh in the trust; and the United States Supreme Court adopts the construction placed upon an Illinois statute by the Illinois Supreme Court. Furthermore, in the case at bar the creditor's bill suit cannot be tried *de novo* by the petitioner's bill of review, and consent decrees entered more than

four months before bankruptcy, not set aside by the judgment of the Illinois Supreme Court, will not be set aside by this court, because no question of bankruptcy law was involved in the matter of entering the decrees in the creditor's suit.

In the case at bar, we are not met with a mere judicial construction of the common law of the State of Illinois as to whether the interest of Mrs. Huszagh passed to Cardwell more than ten months prior to bankruptcy, and did not pass to her trustee in bankruptcy when Mrs. Huszagh filed her petition in bankruptcy. By virtue of the express provisions of Section 49 of Chapter 22 of the Illinois Revised Stautes, we are met with a construction of a state statute, the effect of which is to make the interest of the beneficiary in the trust of the character created by the last will of Mrs. Huszagh's father immune from claims of all judgment creditors or other debts and, therefore, *ipso facto* immune from the claim of the trustee in bankruptcy, who is merely the *alter ego* of a creditor. The immunity of the interest in the Illinois trust created by another is just as inherent in it as is the immunity of an interest in a typical spendthrift trust. The trustee in bankruptcy contends that the interest, as far as it pertains to current income, may be transferred by the beneficiary, but, if so, he fails to grasp the fact that the beneficiary can consent in another lawsuit concluded more than ten months prior to bankruptcy to waive her immunity for a valuable consideration. In fact, the petitioner argues that the interest is immune as to any creditor, unless such creditor have as his intercessor in a plenary suit in an Illinois court the trustee in bankruptcy. Without any claim filed in bankruptcy, a trustee in bankruptcy could not maintain suit to recover alleged assets of the bankrupt. He does not function for his own benefit, but for the benefit of creditors, who have filed a claim. In the case at bar, the petitioner goes further than merely erroneously seek-

ing to maintain a *de novo* suit regarding Mrs. Huszagh's interest; he contends that he can set aside judicial proceedings concluded in good faith more than four months prior to bankruptcy, which had become *res adjudicata* as to the bankrupt more than four months prior to bankruptcy. In other words, the petitioner contends that the trustee in bankruptcy is given a right to proceed in a plenary suit in a state court, and, according to the state law, which would not redound under any circumstances whatsoever, to any other plaintiff in any other case. He seeks to revamp by forced construction, Section 49 of Chapter 22 of the Illinois Revised Statutes to read in effect that it is the intention of the State legislature that this section shall have no application to any suit brought by a trustee in bankruptcy. However, the rule created by the statute mentioned is not a rule of procedure depending upon what party is the plaintiff, as the petitioner contends, but is a rule of property which applies to all litigants, whether such litigant be a trustee in bankruptcy or a judgment creditor representing himself.

It has repeatedly been held by the United States Supreme Court and courts of various jurisdictions that an interest in a trust estate which, according to the law of the state in which such interest was created and in which the bankrupt was domiciled, was not subject to the payment of his debts, is not of a character which passes to a trustee in bankruptcy. In the case at bar, this would be readily admitted by counsel for the petitioner as to the spendthrift trust. The character of the label attached to such interest in the Illinois trust protected by the Illinois statute is immaterial. As far as the bankruptcy act is concerned, there is no more difficulty incurred in holding that the interest of a beneficiary in a trust protected or construed as within the purview of Section 49 of Chapter 22 of the Illinois Revised Statutes, does pass to a trustee in bankruptcy, than there is to hold that the in-

terest in a typical spendthrift trust does not pass to the trustee in bankruptcy. In some states spendthrift trusts are not recognized as valid, but in Illinois and other states where they are valid the interest in such trust does not pass to a trustee in bankruptcy. Even if there had been no creditor's bill proceeding, the petitioner has no right to succeed in a plenary suit in the state court against the beneficiary and the trustee under the will creating the trust, protected against the claims of creditors by virtue of Section 49 of Chapter 22 of the Illinois Revised Statutes. The interest of the beneficiary in the trust estate, in the case at bar, by virtue of Section 49 of Chapter 22 of the Illinois Revised Statutes, is just as immune from the claim of creditors as is the interest of a beneficiary in a typical spendthrift trust. (*Knight* v. *Gregory*, 389 Ill. 554, 561.) By judicial proceedings in a state court the trustee in bankruptcy seeks to take for the benefit of the single creditor represented by him, as trustee in bankruptcy, the identical interest in a trust which, he argues, is protected by the positive enactment of the Illinois statute from the claims of all creditors in any sort of an action in any court in the state of Illinois. The Illinois statute does not purport to discriminate in favor of a creditor represented by a trustee in bankruptcy.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes, which must be read as if incorporated in every will creating in good faith a trust for support of another since the time this statute was passed in 1845, is a rule of property characterizing the beneficiary's interest in such trust. This principle was recognized in the case of *Potter* v. *Couch*, 141 U. S. 296, 312; *Spindle* v. *Shreve*, 111 U. S. 543, 548; *Hull* v. *Farmers Loan & Trust Co.*, 245 U. S. 312, as well as *Eaton* v. *Boston Safe Deposit & Trust Co.*, 240 U. S. 427. However, the question of the immunity of Mrs. Huszagh's interest was not before the state Supreme Court for its determination, because the Supreme

Court of Illinois held that for a valuable consideration the beneficiary in the trust could waive or release her immunity and that Mrs. Huszagh had done so more than ten months before bankruptcy. The fact that Mrs. Huszagh, as the beneficiary in the trust created by her father's will, could release her interest in the trust for a valuable consideration in a consent decree is not synonymous with a holding that interest so released was not within the purview of statutory created immunity. Furthermore, if there were no statutory immunity from liability to pay debts attached to Mrs. Huszagh's interest, then no error of law, aside from any question of consent, was incurred in the creditor's suit. The petitioner contends that every creditor except himself was barred by such immunity, but he was not a party to the creditor's suit. The agreement for release was made ten months before bankruptcy and related to a subject matter concerning which the Illinois Supreme Court stated that she was competent to contract. If Mrs. Huszagh's interest in the trust created by her father's will was not a matter concerning which she was competent to make a contract with Cardwell, it certainly was not an interest which could be transferred by her. The judgment of the state Supreme Court to the effect that she made a valid contract with Cardwell ten months before bankruptcy was the determination of a question of state law, which this court will not review. It related to proceedings concluded ten months before bankruptcy.

Section 70a of the bankruptcy act does not define exemptions and does not purport to create substantive rights and formerly non-existing remedies in favor of the trustee in bankruptcy, (*Holden* v. *Stratton*, 198 U. S. 202; *Steele* v. *Buel*, 104 Fed. 968) which in any wise would militate against or change the construction of the Illinois statute, namely, Section 49 of Chapter 22 of the Illinois Revised Statutes, relating to the character of the beneficiary's interest in a trust estate created in good faith by someone

else for the support and maintenance of another person. It is a confusion of thought to call any kind of a claim a "right" and then, upon the basis of such alleged "right" to contend that property rights under the Illinois statute have been changed. A trustee in bankruptcy, by virtue of the bankruptcy act, is given such specific powers as are therein enumerated, but there is no provision in the act which purports to make property not in the hands of the bankrupt but held in trust for him and others on an active trust amenable to the payment of bankrupt's debts, as represented by the trustee in bankruptcy, when a particular interest in the trust property is immune, by reason of the positive enactment of the state law, from the claim of any creditor. The filing of bankruptcy did not change the effect and validity of a state court's decree in the creditor's suit, which, according to the holding of the Illinois Supreme Court, had become *res adjudicata* more than four months before it was attacked by the petitioner's bill of review.

Petitioner contends that the decrees in the creditor's suit, which both he and Mrs. Huszagh attacked collaterally, petitioner by his bill of review and Mrs. Huszagh by her counterclaim for review, should be regarded as binding upon Mrs. Huszagh, but since Mrs. Huszagh ten months later filed her petition in bankruptcy, the identical decrees, as a matter of law, should be regarded as "changed" by the bankruptcy act, only as far as the rights of the petitioner are concerned. The correctness of the decrees in the creditor's suit, at the time they were entered, was a question to be determined solely by state law, and the only ground upon which the petitioner attacks the correctness of such decrees as of the time they were entered was that they were entered in contravention of the state statute, namely, Section 49 of Chapter 22 of the Illinois Revised Statutes. Not only was the correctness of the decrees, when entered, in the creditor's suit a question of state law,

but the question of the correctness of such decrees when attacked collaterally still remains solely a question of state law and their validity still relates back to the time of their entry which was ten months prior to bankruptcy. The state Supreme Court decided only a question of state law when it held that such decrees could not be attacked collaterally by the petitioner's bill of review or by Mrs. Huszagh's counter-claim for review. If the Supreme Court merely had denied relief to the trustee in bankruptcy and had given relief to Mrs. Huszagh, then it would have decided that there was error in the trial court's decree. By affirming the trial court's decree the state Supreme Court held that the decree was valid at the time of its entry.

It is not true, as petitioner argues, that the section of the Illinois Statute mentioned pertains only to creditors' suits. It is not a mere rule of procedure but a rule of property, and the interest is immune from the claims of creditors no matter what is the form of judicial procedure, whether in equity or at law. *Potter* v. *Couch,* 141 U. S. 296, 319; *Dunham* v. *Kauffman,* 385 Ill. 79; *Baumgarden* v. *Reconstruction Finance Corporation,* 131 Fed. (2d) 741.

If it still be argued that Section 49 of Chapter 22 of the Illinois Revised Statutes appertains only to matters of procedure and not to matters of substance, then it must be borne in mind that according to the laws of the State of Illinois no bill of review lies to correct a decree only on the ground of alleged error in procedure. *Vyverberg* v. *Vyverberg,* 310 Ill. 599; *Knaus* v. *Chicago Title and Trust Company,* 365 Ill. 588, 592, 593; *Cullen* v. *Stevens,* 389 Ill. 35.

The United States Supreme Court from the time of its foundation has adhered to the principle that it will not review judgments of the state court that rest on adequate and independent state grounds, and that it will not use

its power merely to correct allegedly wrong judgments, and to revise opinions. The state Supreme Court by affirming the trial court decree, refused to set aside a former decree of the trial court, attacked collaterally, and in so doing it decided a question of state law which previously had been determined ten months before bankruptcy and therefore, did not involve and could not involve any question of bankruptcy law.

Mrs. Huszagh filed no petition for a writ of certiorari in this court because her counsel is of the opinion that no federal question was involved in the decision of the Illinois Supreme Court. If there was an error in judgment of the State Supreme Court such error only affected the rights of Mrs. Huszagh, which she has sought to protect throughout the litigation.

CONCLUSION.

No question of federal law is involved in this cause, and each of the three petitions for writ of certiorari in cases 823, 824 and 825 should be denied.

Respectfully submitted,

MAURICE P. GOLDEN,
Chicago, Illinois,
Attorney for the Respondent,
Dorothea W. Huszagh.

EDWARD G. BERGLUND,
of Chicago, Illinois,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 823

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF DOROTHEA W. HUSZAGH,
Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH AND FRED J. WEGG, AS THE SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED,
Respondents.

BRIEF OF JAMES R. CARDWELL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION BELOW.

The opinion below is reported in 390 Illinois Supreme Court Reports at page 526 (advance sheets, 390 Ill. No. 6), and is set forth in full in the appendix hereto. It also appears (Rec. pp. 125-132).

STATEMENT MAKING AGAINST JURISDICTION.

Petitioner has not appended to his petition a copy of the opinion of the Supreme Court of Illinois, as required by rule 12, paragraph 1, of this court. Contrary to the rules

of this court, petitioner annexed to his petition a copy of the second opinion of the Illinois Appellate Court. Petitioner has not furnished an index to the record of the Illinois Supreme Court.

There was an adequate and independent non-federal ground of decision to support the judgment of the state Supreme Court. The advent of bankruptcy *ipso facto*, occuring more than four months after the entry of the decrees sought to be attacked, collaterally, solely on the ground of an alleged error of law (Rec. 27), in no wise affected the vadility of such decrees. The sole issue sought to be raised in the trustee in bankruptcy's bill of review was whether, making particular reference to Section 49 of Chapter 22 of the Illinois Revised Statutes (Rec. 27-29; 129) the trial court in the creditor's suit committed an error of law in entering the decrees it entered in that case. No contention was made in any state court that the bankruptcy act was repugnant to the particular Illinois statute involved. The state Supreme Court affirmed the decree of the trial court dismissing for want of equity not only the complaint for review of the trustee in bankruptcy but also the counterclaim for review of Mrs. Huszagh filed in the identical suit; and the gist of its decision was that if there were any error of law committed by the state trial court in entering the decrees in the creditor's suit, a bill of review would not lie at the instance of the trustee in bankruptcy nor at the instance of the judgment debtor, because such decrees were entered more than four months prior to bankruptcy, and pursuant to an agreement made between Mrs. Huszagh (the former judgment debtor) and Cardwell (the former judgment creditor), which, as stated in the opinion of the state Supreme Court, "related to matters in which they were both competent to contract and resulted in the decrees entered by the trial court, becoming consent decrees" (Rec. 132).

The construction which the Illinois Supreme Court placed upon Section 49 of Chapter 22 of the Illinois Revised

Statutes (Rec. 130) related to the interpretation of an Illinois statute in regard to which the federal court would follow the state Supreme Court. The gravamen of the decision was to the effect that a consent decree made, as stated in the state Supreme Court's opinion (Rec. 132) between "parties competent to contract" and in regard to which "Cardwell could not be placed in *statu quo*" (Rec. 132) made the attacked decree *res adjudicata* more than four months prior to the advent of bankruptcy and Mrs. Huszagh, or anyone claiming thru her, after the lapse of more than four months was estopped (Rec. 132) from seeking to attack collaterally the consent decrees solely on the ground of an alleged error of law. Whether the decrees were consent decrees was a question of fact found by the trial court and confirmed by the Illinois Supreme Court, in regard to which this court does not grant certiorari to review.

No substantial or important question of law is presented by this record.

The entire issue below was one of fact.

As a further ground for showing that this court lacks jurisdiction, it should be noted that the petitioner filed three petitions for certiorari, Cases No. 823, 824 and 825. He only has served counsel for James R. Cardwell with a single copy of only one petition and a single copy of the record which bore all three case numbers on it. No order consolidating the three petitions has been entered, and the service of only one copy does not comply with the jurisdictional requirement of service of a copy of petition for certiorari on counsel for the respondent within ten days from the filing of each of such petitions in this court. In the absence of an order of consolidation in this court, each petition for certiorari stands as a separate case on its own merit as far as meeting the jurisdictional requirements of this court, including the matter of serving counsel for the respondents, is concerned.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner's "Summary Statement of the Matter Involved" is incorrect, incomplete and misleading.

On October 11, 1939, James R. Cardwell, a judgment creditor, filed in the Circuit Court of Lake County, Illinois, his creditor's bill (Rec. 5) making Dorothea W. Huszgah and Fred J. Wegg, as trustee under the last will and testament of Frederick H. Wickett, deceased, parties defendant thereto. In the pleadings filed in the creditor's bill suit, no mention was made of Section 49 of Chapter 22 of the Illinois Revised Statutes, which protects certain types of interests in active trusts created by another in good faith for continuing support of the beneficiary from being subjected to the payment of the debts of the beneficiary by any proceeding at law or in equity brought by a creditor. Dorothea W. Huszagh, in her answer (Rec. 15-17) to the creditor's bill, as a defense to the same alleged that the trust created by her late father's will was a spendthrift trust and as such was not subject to be taken for the payment of any judgment against her thru a creditor's bill. The court heard evidence but no transcript of evidence was preserved in the creditor's bill suit, the preservation of such evidence was not necessary under the Illinois law to sustain the validity of the decree.

On November 17, 1939, the state Circuit Court in the creditor's suit entered a decree of sale in which it was specifically found and decreed (Rec. 17-18) that the court had jurisdiction over the parties and the subject matter; that the trust in question was not a spendthrift trust and it was subject to be sold at public vendue to pay the judgment of Cardwell. The state statute cited (Sec. 49 of Chap. 22 Ill. Rev. Stat.) purports to protect only the interest of a beneficiary in a trust estate created in good faith by another. It is always a question of fact, shown by the evidence, whether the trust was created in good faith, and

on collateral attack in a bill of review the state court is not privileged to determine what evidence another court heard or did not hear. There was no proof in the bill of review case as to whether Mrs. Huszagh had contributed to the trust in question.

Seven days after the entry of the decree of sale in the creditor's suit and during term time of the court, Dorothea W. Huszagh made and entered into an agreement with Cardwell, in respect to which the Supreme Court of the State of Illinois in its opinion (Rec. 131-132) said:

> "Within seven days after the entry thereof, the attorney for Mrs. Huszagh approached counsel for Cardwell and asked him if his client would bid the full amount of his judgment upon which the creditor's bill was predicated, so that there would be no deficiency unsatisfied against Mrs. Huszagh. After a complete conversation, the attorney for Cardwell agreed that he would, on behalf of his client, satisfy the entire judgment if Mrs. Huszagh would agree not to litigate the case further. The proposition was submitted to Mrs. Huszagh and she approved the same and authorized her attorney to enter into such agreement. Pursuant to such arrangement, Cardwell was the successful bidder at the sale. He paid all of the costs, including the master's fees. He prepared a satisfaction piece which was approved by Mrs. Huszagh's attorney and filed in the cause. Both Mrs. Huszagh and her attorney testified to the facts above related in the bill of review hearing and the said agreement was fully executed. Mrs. Huszagh accepted the benefits of this agreement which was executed more than four months before she filed her petition in bankruptcy. Cardwell cannot now be placed *in statu quo* and we believe that Dorothea W. Huszagh is precluded and estopped from obtaining any relief under her counterclaim or from relitigating any of the questions determined in the creditor's suit. The trial court had full jurisdiction to pass upon all of the questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a

spendthrift trust. Dorothea W. Huszagh is now estopped from litigating those questions again in the bill of review case.

24. It appears clear to this Court that the agreement made between Mrs. Huszagh and Cardwell related to matters in which they were both competent to contract, and resulted in the decrees, entered by the trial court in the creditor's suit, becoming consent decrees."

After the making of this agreement, the Circuit Court by agreement of the parties entered its decree approving the master's report of sale (Rec. 84).

Ten months after the entry of the decrees mentioned, Mrs. Huszagh filed her voluntary petition in bankruptcy (Rec. 17; Rec. 4) and, thereafter, the petitioner filed his bill of review in the Circuit Court of Lake County, seeking to set aside the decree of sale and the decree approving the master's report of sale in the creditor's bill suit, on the ground that such decrees were entered erroneously because Section 49 of Chapter 22 of the Illinois Revised Statutes (Rec. 27-29) provided that an interest in a trust estate created in good faith by someone other than the beneficiary could not be taken and sold by any judicial process for the payment of a debt of the beneficiary (Rec. 28-29; 131).

The trial court dismissed the complaint filed by the petitioner and also the counterclaim for review filed by Mrs. Huszagh for want of equity, holding, as a matter of fact and of law, that by reason of the agreement which Mrs. Huszagh made and entered into with Cardwell the decrees sought to be attacked became consent decrees and that, furthermore, since Mrs. Huszagh for a valuable consideration had agreed not to take any steps to litigate further the subject matter of the creditor's bill suit or the decree of sale, by appeal, bill of review or otherwise; and since Cardwell could not be placed in *statu quo,* Mrs. Huszagh was estopped more than four months prior to the advent

of bankruptcy from attacking said decrees. Since Mrs. Huszagh for more than four months before bankruptcy had been estopped from attacking said decrees, her trustee in bankruptcy did not have any greater rights to attack (on the sole ground of a mistake of law) the decrees, than Mrs. Huszagh had four months prior to bankruptcy. In other words, the event of bankruptcy did not *ipso facto* recreate rights which had been bargained away in good faith and for a valuable consideration more than four months before bankruptcy.

The trial court in the bill of review case (Rec. 66) found that in the creditor's bill suit the court had jurisdiction over the parties and the subject matter of such decree, and the Supreme Court of Illinois in its opinion, confirmed the finding of the trial court, stating:

> "The trial court had full jurisdiction to pass upon all questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a spendthrift trust." (Rec. 132.)

NOTE: Since the petitioner did not attach a copy of the opinion of the Supreme Court to his petition, as is required by the rules of this court, this respondent has attached a copy of such opinion as an appendix to his brief for the convenience of the court.

THE QUESTIONS PRESENTED.

Although a variety of questions might be regarded as incidentally involved in the decision of the Illinois Supreme Court, that decision does not basically involve more than one question of fact in respect to which the testimony in the bill of review case was undisputed, namely, did Mrs. Huszagh and Cardwell within term time make and enter into an agreement whereby, for a valuable consideration, Mrs. Huszagh agreed not to litigate any further the matters involved in the creditor's bill suit, and by reason thereof the decrees in the creditor's bill case became consent decrees and whereby Mrs. Huszagh, more than four

months prior to the advent of bankruptcy, already was estopped from filing any bill of review or otherwise attacking the decrees in question.

As a matter of Illinois law, this respondent contends that the decrees in the creditor's suit were valid and not subject to any collateral attack, independently of the making of the agreement between Cardwell and Mrs. Huszagh; because the validity of the creditor's bill suit on a collateral attack does not depend upon technical correctness of any pleadings in such suit but upon the evidence heard and considered by the trial court in the creditor's suit (*Stoll* v. *Gottlieb,* 305 U. S. 165, 172, 176), which was not preserved and which, if it was preserved, could not be considered on a collateral attack; and because the unknown evidence in the creditor's suit might have indicated that Mrs. Huszagh had contributed to the trust in question and then, under the Illinois authorities, she would not be entitled to the protection of Section 49 of Chapter 22 of the Illinois Revised Statutes. (*Requa* v. *Graham,* 187 Ill. 67.) Furthermore, her failure to plead or interpose the defense of that statute precluded her from attacking the decrees of the trial court upon the ground of the error claimed by her trustee in bankruptcy.

At the time of the entry of the decrees in the creditor's bill suit sought to be attacked collaterally, no question of bankruptcy law was involved. Mrs. Huszagh did not file her petition in bankruptcy until ten months later (Rec. 4; 27-28.) The validity of the decrees attacked collaterally by a bill of review involved solely a question of state law, as that law was at the time of the entry of the decrees attacked.

The construction which the state Supreme Court placed upon Section 49 of Chapter 22 of the Illinois Revised Statutes was a matter of state law decided by a state court ten months before the advent of bankruptcy, and it did not involve the determination of any question of bankrupcy law.

PROPOSITIONS OF LAW.

I.

A bill of review does not lie to set aside a consent decree which relates only to private rights between parties competent to contract, who acted with the advice of their respective attorneys, in case where such decree was entered more than four months before bankruptcy and is attacked solely on the ground that the trial court committed an error of law in entering such decree.

Harding v. *Harding*, 198 U. S. 317, citing 11 Ill. 540.
Bergman v. *Rhodes*, 334 Ill. 137.
Crow v. *Harrison*, 248 Ill. 462.
King v. *King*, 215 Ill. 100, 115, 119 (did not challenge jurisdiction of court below cannot raise the same on appeal).
Armstrong v. *Cooper*, 11 Ill. 540.
Harrigan v. *County of Peoria*, 262 Ill. 36.

II.

In a case where no question of public policy is involved, and the parties are competent to contract, regarding the subject matter of their agreement, a defendant who, for a valuable consideration, has agreed to take no steps to attack the validity of the decree, ceases to have the right to do so, and it can make no difference whether the decree is erroneous or even void for want of jurisdiction, for the defendant is, nevertheless, bound by his agreement not to attack its validity.

Bergman v. *Rhodes*, 334 Ill. 137.
King v. *King*, 215 Ill. 100.
Smucker v. *Larimore*, 21 Ill. 267.
Corwin v. *Shoup*, 76 Ill. 246 (minor accepting proceeds of a void sale on becoming of age is estopped to prosecute writ of error).

Trapp v. *Off*, 194 Ill. 287.
Hudnall v. *Ham*, 183 Ill. 486.
Hempstead v. *Broad*, 282 Ill. 524.
Bonney v. *Lamb*, 210 Ill. 75, 98.

III.

The Supreme Court of the United States of America does not grant the writ of certiorari for the purpose of inquiring into the weight of the evidence and discussing specific facts in a case where the trial court and the Supreme Court of the State of Illinois have concurred in their findings to the effect that the decrees sought to be attacked collaterally were consent decrees.

United States of America v. *Commercial Credit Co.*, 286 U. S. 63, 67.

Luckenbach v. *McCahan Sugar Refining Co.*, 248 U. S. 139.

> "We do not grant a certiorari to review evidence and discuss specific facts."

United States of America v. *Johnston*, 268 U. S. 220, 227.

IV.

Since the protection, if any, afforded the defendant in a creditor's suit by Section 49 of Chapter 22, Illinois Revised Statutes, may be waived by the defendant and is waived if not asserted when opportunity is afforded, there was no error of law committed by the court in entering the decree in the creditor's suit.

Binns v. *La Forge*, 191 Ill. 598 (creditor's suit).
Wright v. *Dunning*, 46 Ill. 271, at 275 (foreclosure).
The People v. *Fisher*, 340 Ill. 250, at 261.
Harrigan v. *County of Peoria*, 262 Ill. 36.
Hunsley v. *Aull*, 387 Ill. 520, at 523.

V.

Section 49 of the Illinois Chancery Act (Chap. 22, Ill. Rev. Stat.) does not protect a trust which ostensibly proceeds from some person other than the defendant, if, in fact, the defendant directly or indirectly contributed any part of the trust fund, either at the time of its creation or subsequently thereto, and it is always a question of fact whether such defendant did contribute, which need not appear merely from the pleadings in the case, and such question of fact cannot be tried de novo by a bill of review.

Re Qua v. *Graham,* 187 Ill. 67.
Linn v. *Dowling,* 216 Ill. 64.
Harrigan v. *County of Peoria,* 262 Ill. 36.

VI.

A decree in a non-bankruptcy court predicated on the validity of a lien arising more than four months before bankruptcy is res adjudicata in a subsequent suit commenced by the trustee in bankruptcy.

Blair v. *Brailey,* 221 Fed. 1, 4. (Cir. Ct. of Appeals, 5th Circuit—cert. denied 238 U. S. 638.)

VII.

The trial court in reviewing its former decree, on hearing a bill of review for alleged error of law apparent on the record, where the former decree recites that testimony was heard, has no jurisdiction to make a ruling on the effect of going to trial in the case under review without a reply on file. The effect of going to trial without a reply on file cannot be determined from an examination of the pleadings alone, but depends upon the proceed-

ings had and evidence heard upon the trial of the case under review, which is outside of the scope of review allowable either by the trial court reviewing its former decree or the Appellate Court or Supreme Court on appeal in such case.

Knaus v. *Chicago Title & Trust Co.*, 265 Ill. 588, 592-3.

Chap. 110, Par. 164 Ill. Practice Act, Bar Association Edition, 1943 (Specifically provides that the penalty of admission does not apply where "the party has had no opportunity to deny").

Rule 8 of the Illinois Supreme Court gives 20 days to answer and such time had not expired.

Piot v. *Davis*, 241 Ill. 434, 439 (Rule where case was heard on pleadings and evidence).

Dempsey v. *Burns*, 281 Ill. 644.

Kelly v. *Kelly*, 285 Ill. 72, 75.

Guerin v. *Guerin*, 270 Ill. 239, 244.

Imperial Fire Insurance Co. v. *Schimmer*, 96 Ill. 580.

VIII.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes "establishes a rule of property and not of procedure only" (Rec. 131).

Potter v. *Couch*, 141 U. S. 296, 312.

Spindle v. *Shreve*, 111 U. S. 542.

Baumgarten v. *Reconstruction Finance Corp.*, 131 F. (2d) 741.

Hummel v. *Cardwell*, 390 Ill. 526 (*the case at bar*).

Dunham v. *Kaufman*, 385 Ill. 79.

Nichols v. *Levy*, 72 U. S. (5 Wall.) 433.

Knight v. *Gregory*, 389 Ill. 554, 561.

Hull v. *Farmers Loan & Trust Co.*, 245 U. S. 312.

Eaton v. *Boston Safe Deposit & Trust Co.*, 240 U. S. 427.

IX.

The interests of the parties in the case at bar are of such a nature that the court of bankruptcy does not have summary jurisdiction and, therefore, the trustee in bankruptcy had his day in court when he filed his plenary suit in the Illinois court.

Cline v. *Kaplan,* 323 U. S. 97.

In re Baudouine, 101 Fed. 574 (2nd Cir. Ct. N. Y. 1900).

X.

Section 70a of the Bankruptcy Act does not define exemptions or property rights. By its express terms no substantive rights or special remedies are created in favor of the trustee in bankruptcy changing the character of the property which, by virtue of the express terms of an Illinois statute (not mere judicial decision regarding the common law), is not available to be taken in payment of a debt by any judicial process.

Hull v. *Farmers L. & T. Co.,* 245 U. S. 312.

Eaton v. *Boston Safe Deposit Co.,* 240 U. S. 427.

Potter v. *Couch,* 141 U. S. 296, 319.

Spindle, Assignee v. *Shreve,* 111 U. S. 542.

Southern Dairies, Inc. v. *Banks,* 92 F. (2d) 282 (certiorari denied 302 U. S. 761).

Steele v. *Buel,* 104 Fed. 968 (Cir. Ct. of App. 8th Circuit 1900).

Holden v. *Stratton,* 198 U. S. 202.

Turner v. *Bovee,* 92 F. (2d) 791, 792.

Lockwood v. *Exchange Bank,* 190 U. S. 294.

SUMMARY OF ARGUMENT.

1. The petitioner by his bill of review sought to attack collaterally, solely on the ground of alleged error of state law, two consent decrees (not subject to be reviewed by a bill of review), which had become *res adjudicata* more than 4 months prior to bankruptcy.

2. Whether the decrees sought to be attacked collaterally were consent decrees was a question of fact, and the finding of the state trial court, confirmed by the state Supreme Court, will not be reviewed by certiorari by this court.

3. Aside from the question of consent decrees, a bona fide agreement made for a valuable consideration respecting a subject matter in regard to which the parties were competent to contract, wherein the parties agreed to settle and compromise their litigation, fully executed more than 4 months prior to bankruptcy, estops both parties to such agreement, and the petitioner claiming through one party, from maintaining his bill of review.

4. A state court decree, which became *res adjudicata* more than 4 months prior to bankruptcy, is not affected by the provisions of Section 70a of the bankruptcy act in case where such decree is sought to be attacked by the petitioner solely on the ground that the court entering the decree committed an alleged error of state law.

5. No question of bankruptcy law was necessarily involved in the decision of the state Supreme Court, which construes the effect of a state statute (Section 49 of Chapter 22 of the Illinois Revised Statutes) making the interest of a beneficiary in a trust created in good faith by another for the support of the beneficiary just as immune from the

claim of creditors as an interest in a so-called typical spendthrift trust.

6. There was no error of law committed by the trial court in entering the decrees sought to be attacked collaterally.

7. No question of any conflict between any Illinois statute and the bankruptcy act, or any question of due process of law, is involved.

8. No question of federal law or any important question of law is here involved.

ARGUMENT.

I.

A. A bill of review does not lie to set aside a consent decree which relates only to private rights between parties competent to contract, who acted with the advice of their respective attorneys in a case where such decree was entered more than four months before bankruptcy and is attacked solely on the ground that the trial court committed an error of law in entering such decree.

B. Consent that the decrees shall stand and be enforced, given by the defendant to the plaintiff for a valuable consideration, within term time, makes the decrees consent decrees, in regard to which under the Illinois law no bill of review will lie.

The petitioner contends that the interest of Dorothea W. Huszagh in the trust estate created by her father's will could be assigned by her and, therefore, her right, if she had any, to attack the consent decrees passed to the petitioner.

Upon the same premise that such interest could be assigned, such interest was a subject matter which both the Illinois trial court (Rec. 66, 98) and the Illinois Supreme Court in its opinion (Rec. 132) properly found was of such a character "that the agreement made between Mrs. Huszagh and Cardwell related to matters in which they were both competent to contract."

Upon the premise that Mrs. Huszagh could have assigned her beneficial interest in the trust estate, Mrs. Huszagh could make a bargain with Cardwell, which she did make, relating to her interest, providing that the decree for the sale of her interest stand and be carried out by a sale at public auction. If at such sale the interest brought

more than the amount due Cardwell on his judgment, the overplus would have been given to Mrs. Huszagh. The fact that at the public sale there was no overplus is immaterial. Cardwell agreed (Rec. 131-132), regardless of what price the interest brought at the master's sale, to satisfy in full his common law judgment entered against Mrs. Huszagh in another case, to pay master's fees, which he did, in the sum of $200.00 and all expenses and costs in the creditor's suit, and agreed to file a satisfaction piece in the common law suit.

In case where the parties are competent to contract respecting the subject matter of their agreement, a defendant who, for a valuable consideration, has agreed to take no steps to attack the validity of the decree, ceases to have the right to do so, and it makes no difference whether the decree is erroneous or even void for want of jurisdiction, because the defendant, nevertheless, is bound by his agreement not to attack its validity. (*Hempstead* v. *Broad*, 275 Ill. 358, 365; *Corwin* v. *Shoup*, 76 Ill. 246; *Bergman* v. *Rhodes*, 334 Ill. 137; *King* v. *King*, 215 Ill. 100.)

Since more than four months elapsed from the time of the entry of the consent decrees sought to be attacked collaterally and the advent of bankruptcy, the decrees sought to be attacked had become *res adjudicata* more than four months prior to bankruptcy. There is no provision in the bankruptcy act which gives the trustee in bankruptcy rights to attack and set aside decrees on the sole ground of a mistake of law which, according to the laws of the State of Illinois, have become *res adjudicata* between the parties more than four months prior to the advent of bankruptcy.

There is no question of fraud involved in this case (Rec. 87). The sole ground upon which the trustee in bankruptcy sought to attack the decrees by his bill of

review was on the ground of mistake of law (Rec. 27; 129), but a consent decree, entered more than four months prior to the advent of bankruptcy, cannot be set aside because of any error of law in entering such decree, either by a party to such decree or by his trustee in bankruptcy. (*Harding* v. *Harding*, 198 U. S. 317, citing *Armstrong* v. *Cooper*, 11 Ill. 540; *Crow* v. *Harrison*, 248 Ill. 462.)

A bill of review does not lie to set aside a consent decree on the ground of an error of law.

Petitioner contends in his petition that the sale held pursuant to the decrees entered in the creditor's bill suit transferred to Cardwell legal title to the beneficial interest of Mrs. Huszagh in the trust estate created by her father's will. The decree of the trial court ordering the sale in the creditor's suit, and the decree of the trial court in that suit approving the sale, the force and effect of the undisputed agreement made between Cardwell and Mrs. Huszagh, and the Master's public sale and assignment were effective for the purpose of transferring to Cardwell the interest of Mrs. Huszagh in the trust estate created by her father's will, because both the bill of review of the trustee in bankruptcy and the counterclaim for review of Mrs. Huszagh were dismissed for want of equity by the decree of the trial court in the bill of review suit, which was affirmed by the judgment of the state Supreme Court.

The transfer of Mrs. Huszagh's interest, however, was fully effectuated through the consent decrees entered ten months before the advent of bankruptcy, and such decrees, by virtue of the agreement between Cardwell and Mrs. Huszagh, were not subject to be set aside by a bill of review after having been entered. However, it appears that the trustee in bankruptcy makes the contention that because "title to Mrs. Huszagh's interest" passed to Cardwell by proceedings had in the creditor's bill suit, there

was a transfer of Mrs. Huszagh's beneficial interest in the trust within the purview of Section 70a(6) of the bankruptcy act relating to "the unlawful taking or detention of or injury to his property." To contend that a valid consent decree entered ten months before bankruptcy is an unlawful taking is a misnomer and begs the question. Such a contention concedes that in the creditor's suit the court had jurisdiction over the parties and the subject matter of its decree, as was found by both the trial court (Rec. 66) and by the state Supreme Court in its opinion (Rec. 132) otherwise there would be no "taking" as the petitioner alleges. The validity of a consent decree was confirmed by the judgment of the state Supreme Court. Its validity depended upon what was the law of the State of Illinois at the time the decrees sought to be attacked were entered and when Mrs. Huszagh made her agreement with Cardwell. At that time there was no bankruptcy, and no question of bankruptcy law was involved. Reviewing such decrees at a later date, more than four months after their entry, does not involve any proper question of bankruptcy law.

The state Supreme Court, construing Section 49 of the Illinois Chancery Act (Chap. 22 of the Illinois Revised Statutes 1945) relied upon by the plaintiff in his bill of review as sole ground for showing that there was an error of law in entering the decree in the creditor's suit, determinined only what was the proper construction of the state statute law at the time the consent decrees were entered. The state Supreme Court, in construing the Illinois statute relied upon, held that upon the facts in the case, as found by the trial court and confirmed by the state Supreme Court, no bill of review would lie. Such a determination of fact and state statute law is not subject to be reviewed by certiorari by this court. Whether such decrees should be set aside by a bill of review was solely a question of state law. If the decrees were subject to be

set aside by a bill of review although they were consent decrees and although Mrs. Huszagh made her agreement with Cardwell, then the Supreme Court would have provided in its judgment that relief be given to either the trustee in bankruptcy on his bill of review or to Mrs. Huszagh, on her counterclaim for review. Its actual decision in the case was that no bill of review would lie at the instance of Mrs. Huszagh or at the instance of the trustee in bankruptcy, and the rationale of the Supreme Court's decision was that the decrees sought to be attacked, being consent decrees, were at no time subject to be set aside by a bill of review on the ground of a mere error of law by Mrs. Huszagh. After the lapse of four months, the trustee in bankruptcy could claim only that the "rights" of Mrs. Huszagh "passed" to him. However, since Mrs. Huszagh had no right to maintain a bill of review, there was no right which "passed" to her trustee in bankruptcy on the advent of bankruptcy, irrespective of the fact whether Mrs. Huszagh's interest would have passed to the trustee in bankruptcy if there had been no creditor's bill proceedings and if there had been no agreement between her and Cardwell. Having decided in the negative the first question as to whether Mrs. Huszagh at any time had a right to maintain a bill of review to set aside a consent decree in the creditor's suit, because of an alleged error at law, the opinion of the Supreme Court of Illinois dealing with the second question, as to whether or not the trustee in bankruptcy would have had a right to maintain a bill of review to set aside the decrees in the creditor's suit if Mrs. Huszagh had not made the agreement she made with Cardwell, was a moot question not necessarily involved in this case and constituted mere dictum. By claiming that Mrs. Huszagh's "right" to maintain a bill of review "passed" to him by virtue of Section 70a(5) or 70a(6) of the bankruptcy act, the petitioner begs the question. He claims that he can set aside consent decrees

because a "right" to set them aside "passed" from a bankrupt by virtue of the bankruptcy act in case where at the advent of bankruptcy and more than four months prior thereto the bankrupt had no right to set aside the consent decrees for alleged error of law. This being the status of the attacked decrees more than four months before bankruptcy, there could not have been an unlawful taking within the meaning of Section 70a(6) of the bankruptcy act by virtue of a decree which was found and adjudicated by the Supreme Court of Illinois, at a time it had jurisdiction over the parties and the subject matter in the bill of review case, to be lawful and not subject to be set aside.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes were enacted as a matter of public policy for the benefit of a beneficiary in a trust estate but have never been construed to hold that in a creditor's bill, with the consent of the beneficiary, such property could not be sold to pay a debt. In the case of *Binns* v. *LaForge,* 191 Ill. 598, the Supreme Court affirmed a decree of the trial court which subjected the interest of a beneficiary in a trust, within the purview of the statute cited, to the payment of a debt, because the beneficiary did not take an appeal. The Illinois Supreme Court would not in the case last cited have affirmed the decree of the trial court if it were of the opinion that the trial court had no jurisdiction to enter the decree it did enter. When the Supreme Court affirms a decree of the trial court, it can no longer be contended that the trial court entering such decree did not have jurisdiction over the parties and the subject matter of its decree.

The trustee in bankruptcy, at various times, and even in his argument in the petition filed in this court, has tried to treat matters in the bill of review case as if he were trying the creditor's bill suit *de novo,* with a right

to interpose defenses on behalf of Mrs. Huszagh or on his own behalf, which were not interposed in the creditor's suit. He has purposely failed to mention in his summary statement of facts or argument the very salient and controlling feature of the state Supreme Court decision to the effect that the decrees sought to be attacked collaterally were consent decrees, and has not enlightened this court as to the controlling fact that Cardwell and Mrs. Huszagh, for a valuable consideration, made and entered into an agreement more than ten months before bankruptcy, wherein Mrs. Huszagh agreed not to litigate further, and, in particular, not to take any appeal or file any bill of review in respect to the decree of sale in the creditor's suit.

Contrary to the rules of this court, the petitioner has adopted the novel and unwarranted expediency of attaching as appendix to his petition, not a copy of the opinion of the Illinois Supreme Court but the second opinion of the Illinois Appellate Court, although his petition herein is not and could not be directed to the judgment of the Appellate Court, reversed, as it was, by the judgment of the Illinois Supreme Court.

II.

Whether the decrees in the creditor's suit sought to be attacked collaterally by a bill of review were consent decrees is a question of fact which will not be reviewed on certiorari by the Supreme Court of the United States.

The Circuit Court of Lake County, Illinois, found and adjudicated (Rec. 66-67) that the decrees sought to be attacked were consent decrees and that, for a valuable consideration, Mrs. Huszagh had agreed with Cardwell that she would not file any bill of review or take any further steps to litigate the validity of the decrees sought to be attacked by the trustee in bankruptcy. The bona fides of

such agreement is not in issue (Rec. 87) but is conceded in this case where the validity of the decrees is sought to be attacked collaterally only on the ground of an error of law (Rec. 27-29; 129). Whether the decrees were consent decrees is a matter of fact, and the finding of the trial court, concurred in by the Supreme Court of Illinois, makes such fact final, because the Supreme Court of the United States does not grant a writ of certiorari for the purpose of inquiring into the weight of the evidence and discussing specific facts. (*Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139.) Furthermore, the evidence in the bill of review case (Rec. 81-89), showing that the decrees were consent decrees is undisputed.

III.

Section 70a of the Bankruptcy Act does not define exemptions or create property rights in derogation of the express terms of the Illinois statute (Section 49 of Chapter 22 of the Illinois Revised Statutes) pertaining to the interest of a beneficiary in a trust estate created in good faith for support of someone other than the beneficiary.

It is the contention of the trustee in bankruptcy that even in the absence of fraud or mistake of fact, he has some special standing and privilege in a plenary bill of review suit in a court of Illinois to attack decrees which became *res adjudicata* more than four months prior to bankruptcy, which the bankrupt would not have if bankruptcy had not intervened. There is no language in Section 70a of the bankruptcy act which could be construed to create such special remedy or discrimination in favor of a trustee in bankruptcy.

The Supreme Court of Illinois was right in holding, as a matter of *obiter dicta* that in a plenary suit a trustee in bankruptcy has no right to take an interest in property which, by virtue of an express statute (Section 49 of

Chapter 22) of the State of Illinois, as construed by not only the Supreme Court of that state but as repeatedly construed by the Supreme Court of the United States, creates a rule of property and renders property of the specific character falling within the purview of the statute immune from claims of all creditors. Property so immune from claims of all creditors would not have passed to the trustee in bankruptcy if there had not been any proceedings in the creditor's bill suit. This holding by the Illinois Supreme Court was not necessary to its decision, which rested solely, as appears from the dismissal of Mrs. Huszagh's counterclaim for review, upon the ground that the decrees were consent decrees entered more than four months prior to bankruptcy.

The dictum of the Supreme Court to the effect that the trustee in bankruptcy had no right to recover and administer as a part of the assets of the bankrupt's estate any portion of the principal or income from the trust estate created by the last will of Mrs. Huszagh's father, was not the basis of its judgment.

However, the dictum of the Illinois Supreme Court was based upon its own construction of Section 49 of Chapter 22 of the Illinois Revised Statutes, which must be regarded as if it were read into every trust made since the passage of that statute in 1845. Such statute gives a particular character to the interest of a beneficiary in a trust estate, that is within the purview of Section 49 of Chapter 22 of the Illinois Revised Statutes, also known as Section 49 of the Illinois Chancery Act, and creates a rule of property. (*Potter* v. *Couch*, 141 U. S. 296, 312.) Such interest is as immune from the beneficiary's debts as is an interest in a typical spendthrift trust.

In the case of *Steib* v. *Whitehead*, 111 Ill. 247, where the interest of a beneficiary in a typical spendthrift trust was involved, the Supreme Court of Illinois held that funds

in the hands of the trustee could not be attached by creditors.

In the case of *Knight* v. *Gregory,* 389 Ill. 554, at page 561 of its opinion, the Illinois Supreme Court stated:

> "In view of section 49 of the Chancery Act, however, all active trusts, which otherwise qualify, come under the doctrine of *Steib* v. *Whitehead,* 111 Ill. 247. With these authorities and others of a similar nature cited by appellants we agree. These authorities are, however, concerned only with an interpretation of the rights of creditors seeking redress against funds in the hands of a trustee under either a spendthrift trust or an active trust qualifying under Section 49 of the Chancery Act."

In *Potter* v. *Couch,* 141 U. S. 296, at page 320 of its opinion, the Supreme Court of the United States in speaking of the Illinois statute stated:

> "the spirit of the statute alike require that this equitable interest should not be charged for his debts."

and that the Illinois statute

> "establishes a rule of property, and not of procedure only."

In *Eaton, Trustee in Bankruptcy* v. *Boston Safe Deposit and Trust Company,* 240 U. S. 427, the court had under consideration a trust established by a will, in which will it was provided that the income shall be free from interference of creditors. In Illinois, Section 49 of Chapter 22 of the Illinois Revised Statutes, had been in force and effect in its present form since the year 1845, and it has repeatedly been construed as creating a rule of property. Every will creating a trust, bona fidely created by one person for the benefit of another, must be read to the same extent and in like manner as if specific reference to the statute mentioned had been made in the will. With this fact in mind, the case at bar, as far as the contentions of the

petitioner are concerned, is similar to the case of *Eaton, Trustee in Bankruptcy* v. *Boston Safe Deposit and Trust Company*, 240 U. S. 427, in which the Supreme Court stated in its opinion:

> "The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it."

Since the petitioner contends that he was entitled to maintain his bill of review only because of the force and effect of Section 49 of Chapter 22 of the Illinois Revised Statutes, he must be bound by the construction placed on that statute by the Supreme Court of Illinois. The United States Supreme Court will follow the decisions of the Illinois Supreme Court construing an Illinois statute. In the case of *Page* v. *Edmunds*, 187 U. S. 596, at page 602, the United States Supreme Court stated:

> "If those decisions are interpretations of the state statute, we must yield to their authority."

No question of any conflict between any Illinois statute and the bankruptcy act, or any question of due process of law, is involved. No question of federal law or any important question of law is here involved.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this is not a proper case for review by certiorari and that the petition for such writ should be denied.

Respectfully submitted,

DWIGHT S. BOBB,
Attorney for the Respondent,
James R. Cardwell.

OSCAR S. SEAVER,
Of Counsel.

APPENDIX.

OPINION OF THE SUPREME COURT.

Appeals from the Appellate Court for the Second District;—heard in that court on appeal from the circuit court of Lake county; the Hon. Ralph J. Dady, Judge, presiding.

Edward G. Berglund, of Chicago, for appellant Dorothea W. Huszagh; Oscar S. Seaver, of Chicago, for appellant James R. Cardwell; Barre Blumenthal, of Chicago for appellant Fred J. Wegg, trustee; Sidney H. Block, of Waukegan, for appellee.

MR. CHIEF JUSTICE FULTON DELIVERED THE OPINION OF THE COURT:

On November 15, 1940, Fred E. Hummel, as trustee in bankruptcy of the estate of Dorothea W. Huszagh, filed his bill of review in the circuit court of Lake county, seeking to vacate and set aside two decrees entered in that court, namely, a decree of sale entered November 17, 1939, and a decree approving the master's report of sale entered on December 15, 1939, both in a creditor's suit commenced by James R. Cardwell against Dorothea W. Huszagh and Fred J. Wegg, trustee. The defendants to the complaint were James R. Cardwell, Dorothea W. Huszagh and Fred J. Wegg, as the sole trustee under the will of Frederick H. Wickett, deceased. All of the defendants filed answers and Dorothea W. Huszagh filed a counterclaim.

On a hearing in the circuit court, the chancellor dismissed both the complaint and the counterclaim as being

without equity. From this decree Hummel appealed to the Appellate Court for the Second District and all of the defendants filed cross appeals, resulting in a variety of contentions, all earnestly urged by the different parties to the suit.

The Appellate Court reversed the action of the trial court in dismissing, for want of equity, the bill of review filed by the trustee in bankruptcy, and affirmed that portion of the decree of the circuit court which dismissed, for want of equity, the counterclaim for review filed by Dorothea W. Huszagh. It further remanded the cause to the Lake county circuit court with directions to vacate and set aside its decree of sale entered November 17, 1939, and also the decree of December 15, 1939, approving the report of sale, and to restore Dorothea W. Huszagh to her former status and condition under her father's will as though the former decrees had not been rendered. Separate petitions for leave to appeal were filed by the defendants and allowed, and, by order of court, the appeals have been consolidated. All of the above-named defendants to the bill of review appear as appellants in this court.

The will of Frederick H. Wickett, after providing for the payment of his debts, and making minor specific bequests, devised and bequeathed to Fred J. Wegg (and Norman M. Hancock, who refused to act,) his entire estate, in trust, for the uses and purposes set forth in the will. Fred J. Wegg qualified and assumed the trust imposed in him by said will, and, as such trustee, he was given full power to manage and control all of the residuary estate. The title to said estate vested in said trustee with ample authority and discretion to sell and dispose of the property as he deemed best, the proceeds of such sales, however, to become a part of the trust estate and subject to the terms of the trust. The tenth clause of the will directed the trustees to pay, out of the trust estate, the sum of $1500

per month to the wife, Alice W. Wickett, during her lifetime, and such other sums as she might, in the judgment of the trustees, deem fit for her needs and requirements. Alice W. Wickett, the widow of the testator, renounced the provisions of the will for her benefit.

The eleventh clause of the will reads as follows: "Upon the death of my said wife, my said trustees are directed to pay the net annual income of my said trust estate, in such installments as in their judgment shall seem best, equally to my children, Dorothy Huszagh and Marjorie Huszagh, share and share alike. My said trustees are, however, expressly authorized and empowered to pay over and deliver to my said children, Dorothy Huszagh and Marjorie Huszagh, from time to time, as in their judgment shall seem fit, such further or other portion of the corpus of this trust estate; Provided, however, that at all times both my said children shall be treated equally, so far as the division of said trust estate is concerned."

By the thirteenth clause of the will, the trust period was to continue for twenty years after the death of his wife.

The fifteenth clause of the will is as follows: "I hereby expressly authorize and empower my trustees from time to time to pay any part of the corpus of this trust estate to any of my relatives if, in the opinion of my said trustees, they may be in want or need of assistance."

By reason of the renunciation on the part of the widow, the legal title and possession of that part of the estate relinquished by her, with other residuary assets of the estate, passed to the trustee, Wegg, as part of the trust estate. *Dunshee* v. *Dunshee,* 251 Ill. 405; *Sueske* v. *Schofield,* 376 Ill. 431.

In October, 1939, the appellant James R. Cardwell, having obtained, on August 3, 1939, a judgment against

Dorothea W. Huszagh, filed a complaint in the nature of a creditor's bill in the circuit court of Lake county against Mrs. Huszagh and Wegg, as trustee, and sought to reach the interest which Mrs. Huszagh had in the trust created by the will of her father. Both Wegg, as trustee, and Dorothea W. Huszagh filed answers denying that the interest of the latter in said trust was subject to sale for the benefit of the creditor, and maintaining that the trust was in the nature of a spendthrift trust. On a hearing in the creditor's suit, the circuit court of Lake county held that the interest of Dorothea W. Huszagh in the said trust estate constituted personal property of an equitable nature and did not create a trust in the nature of a spendthrift trust and that such interest was subject to equitable attachment and sale in that proceeding for the purpose of satisfying, in whole or in part, the unpaid judgment in favor of Cardwell. A decree of sale in said cause was entered On November 17, 1939, and a sale was held by the master in chancery at which Cardwell became the purchaser of the interest of Dorothea W. Huszagh. The sale was approved and confirmed in the circuit court by decree dated December 15, 1939.

Dorothea Huszagh had also been a defendant in a foreclosure proceeding in the city of Chicago, where a decree of sale was entered on June 30, 1939. Pursuant to this decree, a sale was made resulting in a deficiency decree against Dorothea Huszagh in the sum of $533,394.13. On August 20, 1940, she filed voluntary bankruptcy proceedings, and the appellee herein was appointed trustee in bankruptcy on October 24, 1940. On November 15 thereafter, he filed his complaint for review.

In his complaint the trustee in bankruptcy contends that the circuit court did not have jurisdiction to enter the decree of sale in the creditor's suit disposing of the interest of Dorothea W. Huszagh in the trust because it

is governed by section 49 of the Chancery Act. (Ill. Rev. Stat. 1943, chap. 22, par. 49.) The provision reads as follows: "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a complaint against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not; * * *."

The claim of Cardwell, as the judgment creditor and as the purchaser of Dorothea W. Huszagh's interest in the trust at the sale, necessarily rests upon the validity of the decree entered November 17, 1939. He insists that the circuit court had jurisdiction of the parties and of the subject matter of the trust; that, on the hearing, testimony was taken in open court; that the court determined the trust was not a spendthrift trust, and that no appeal was taken from that decree; also, that within seven days after the decree of sale was entered, Dorothea W. Huszagh, for a valuable consideration, agreed she would not take any action by way of appeal or review or question

the decrees taken in the creditor's suit. He appeals from the action of the Appellate Court wherein it reversed the decree of the trial court in dismissing the bill of review for want of equity.

Dorothea W. Huszagh maintains that the trust created in her father's will is a spendthrift trust; seeks to reverse the judgment of the Appellate Court and insists that the portion of the decree of the trial court dismissing Hummel's bill of review for want of equity should be affirmed; also that the portion of said decree in the trial court dismissing her counterclaim for review should be reversed with direction to grant the prayer contained in the said counterclaim.

Fred J. Wegg, the trustee under the will, asks that the accounting between himself and Dorothea W. Huszagh, as determined by the decree of the circuit court of Lake county in the creditor's suit, under date of November 17, 1939, be confirmed.

Fred E. Hummel, the trustee in bankruptcy and appellee in this court, urges that the judgment of the Appellate Court be affirmed, with directions to the trial court for the entry of a decree and the terms thereof.

With the great diversity of contentions made by the various interests in this cause, it will be difficult to discuss in detail each and all of the questions raised in the briefs.

At the outset, we are confronted with the problem of whether or not the trustee in bankruptcy has such an interest in Mrs. Huszagh's interest in the trust estate as entitles him to maintain his bill of review in this cause.

As above expressed, it is his contention that the order or decree of sale entered by the circuit court of Lake county in the creditor's suit on November 17, 1939, was void because beyond the jurisdiction of the court. His bill of review is based upon the theory that there was

"error apparent" upon the face of the record in that case. Specifically, he maintains that the court had no power to order a sale of Dorothea W. Huszagh's interest in the trust estate because it was in contravention of the exception contained in section 49 of the Chancery Act above quoted.

The record in the case indicates that the creditor's suit in the trial court was determined on the question of whether or not the will of Frederick H. Wickett created a spendthrift trust with Dorothea W. Huszagh as a beneficiary. The chancellor found that her interest in the trust was not in the nature of a spendthrift trust, but there was no express finding as to whether her interest was protected by said section 49. We agree with the statement of the trustee in bankruptcy that the interest of Dorothea W. Huszagh in the trust was not an estate on which a judgment at law would be a lien. We do not believe such interest could be reached by a creditor's bill or that, through a creditor's bill, a creditor could acquire any lien. The trust created in the will may well be described as an active trust and comes squarely under the provisions of the exception in said section 49. The legal title to the assets of said trust became vested in Fred J. Wegg, as trustee under the will. The funds in the trust came directly from the estate of Frederick H. Wickett, and, so far as the record discloses, it was created in good faith and expressly for the purpose of protecting the income. *Potter* v. *Couch,* 141 U. S. 296.

We agree further with the statement of appellee that one of the essentials of a valid judgment is that the court have jurisdiction to render that particular judgment. (*Armstrong* v. *Obucino,* 300 Ill. 140; *People ex rel. Carlstrom* v. *Shurtleff,* 355 Ill. 210; *Thayer* v. *Village of Downers Grove,* 369 Ill. 334.) However, we cannot see that the trustee in bankruptcy is in any better position to

reach Mrs. Huszagh's interest in the trust than was Cardwell, the plaintiff in the creditor's suit. The office of trustee in bankruptcy is created by the Bankruptcy Act, and his powers and the remedies he is authorized to pursue in a plenary suit are defined in such act. The appellee relies upon subsection 5 of section 70A of the Bankruptcy Act for his power and authority to reach the trust estate in this action. The said clause vests the trustee, by operation of law, with the title of the bankrupt, except insofar as it is to property which is held to be exempt, to "property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered." Under this section, we believe the rights of the trustee in bankruptcy relate only to property which passes to him without the necessity of bringing a plenary suit to recover. It refers to property which was in the possession or control of the bankrupt at the date of the bankruptcy. In section 70C of the same act, with reference to all other property, the trustee in bankruptcy is vested with all the rights, remedies and powers of a judgment creditor, and no more.

If the protection of section 49 of the Chancery Act makes the interest of Dorothea W. Huszagh in the trust immune from any suit or lien by a creditor, surely a trustee in bankruptcy representing a creditor can have no greater or superior right. In the matter of exemptions and the interpretations of property rights, the bankruptcy courts have always regarded decisions of the State courts as controlling. (*Erie* v. *Tompkins,* 304 U. S. 64.) In *Johnston* v. *Herrin,* 383 Ill. 598, we held that a contingent interest of a bankrupt is not property which the trustee in bankruptcy can recover in a plenary suit.

The trustee in bankruptcy contends that the amendment to the Bankruptcy Act in 1938 shows that property,

even though it may not be subject to seizure, may pass to the trustee if it is transferable. With the exception given to exempt property in section 70A of the act and the power to acquire property through a plenary suit limited to those of a judgment creditor in section 70C, we do not construe the act to give a trustee in bankruptcy in plenary suits greater remedies in a State suit than those afforded a judgment creditor. Any other rule would be contrary to the plain language of section 70C and permit a trustee to take property which, under the laws of Illinois, could not be taken by any other plaintiff for the payment of a debt. In *Dunham* v. *Kauffman*, 385 Ill. 79, we held that the interest of a beneficiary in a trust could not be reached by attachment. In *Baumgarden* v. *Reconstruction Finance Corp.*, 131 Fed. 2d 741, the Circuit Court of Appeals held that a trust fund which came squarely under the exception in section 49 of the Chancery Act could not be reached by garnishment. It is clear, from the holdings of this court and that of other jurisdictions, that section 49 of the Chancery Act creates a rule of property and does not relate solely to procedure. (*Potter* v. *Couch*, 141 U. S. 296.) The Appellate Court erred in holding that the trustee in bankruptcy had a right to challenge the validity of the sale of the truste estate. The trial court correctly ruled that the bill of review filed by the trustee in bankruptcy should be dismissed for want of equity.

Neither do we believe that Dorothea W. Huszagh is entitled to maintain her present counterclaim or to obtain any relief thereunder. The trial court was in error when it entered the decree of sale on November 17, 1939, in the creditor's suit ordering the interest of Mrs. Huszagh in the trust estate to be sold to satisfy the Cardwell judgment upon which the creditor's suit was based. However, that decree recited that, on the testimony taken in open court and the argument of counsel for the respective parties, it had jurisdiction over all parties in the cause and

the subject matter of the decree. The circuit court of Lake county, sitting as a court of equity, had full power to pass upon all questions arising on the pleadings in the creditor's suit. No action by way of review or appeal was taken from that decree and the testimony was not preserved. Within seven days after the entry thereof, the attorney for Mrs. Huszagh approached counsel for Cardwell and asked him if his client would bid the full amount of his judgment upon which the creditor's bill was predicated, so that there would be no deficiency unsatisfied against Mrs. Huszagh. After a complete conversation, the attorney for Cardwell agreed that he would, on behalf of his client, satisfy the entire judgment if Mrs. Huszagh would agree not to litigate the case further. The proposition was submitted to Mrs. Huszagh and she approved the same and authorized her attorney to enter into such agreement. Pursuant to such arrangement, Cardwell was the successful bidder at the sale. He paid all of the costs, including the master's fees. He prepared a satisfaction piece which was approved by Mrs. Huszagh's attorney and filed in the cause. Both Mrs. Huszagh and her attorney testified to the facts above related in the bill of review hearing and the said agreement was fully executed. Mrs. Huszagh accepted the benefits of this agreement which was executed more than four months before she filed her petition in bankruptcy. Cardwell cannot now be placed *in statu quo* and we believe that Dorothea W. Huszagh is precluded and estopped from obtaining any relief under her counterclaim or from relitigating any of the questions determined in the creditor's suit. The trial court had full jurisdiction to pass upon all of the questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a spendthrift trust. Dorothea W. Huszagh is now estopped from litigating those questions again in the bill of review case.

It appears clear to this court that the agreement made between Mrs. Huszagh and Cardwell related to matters in which they were both competent to contract, and resulted in the decrees, entered by the trial court in the creditor's suit, becoming consent decrees. (*King* v. *King,* 215 Ill. 100; *Bergman* v. *Rhodes,* 334 Ill. 137.) Both the trial court and the Appellate Court correctly held that the counterclaim of Dorothea Huszagh should be dismissed.

Because of the view we take of the questions above discussed, it is not necessary to pass further upon the appeal of Fred J. Wegg, trustee. That part of the judgment of the Appellate Court affirming the decree dismissing the counterclaim of Dorothea W. Huszagh is affirmed. The part of the judgment reversing the trial court's decree dismissing the bill of review is reversed.

Appellate Court affirmed in part and reversed in part; circuit court affirmed.

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Summary of Argument.

The Illinois Supreme Court passed on a question of fact as to whether or not the transaction between Dorothea W. Huszagh and Cardwell constituted a valid agreement, and decided that it did. Such agreement having been executed more than four months prior to bankruptcy, no federal question is involved.

The availability of bankrupt's trust income to his Trustee in Bankruptcy is determined by the law of the situs of the trust. The interpretation of property rights rests in the decision of the State courts and those decisions are controlling.

Where the decisions of a State court might have been either on a State ground or a Federal ground and the State ground is sufficient to sustain the judgment, the Supreme Court will not grant review even if the Federal law is erroneously interpreted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1945

No. 824

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF DOROTHEA W. HUSZAGH,

Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH AND FRED J. WEGG, AS THE SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED,

Respondents.

BRIEF OF FRED J. WEGG, AS SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED, ONE OF THE RESPONDENTS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION BELOW.

The opinion below is reported in 390 Illinois Supreme Court Reports at Page 526. No opinion of the Illinois Supreme Court is attached to the petition. The substitution of the Appellate Court opinion, as an appendix to the petition is improper.

STATEMENT MAKING AGAINST JURISDICTION.

The case at bar was decided by the Illinois Supreme Court on a mixed question of fact and law, as to which it determined that the decree entered in the creditor's bill proceeding was in fact and in law a consent decree; the same having been fully implemented by the parties thereto, the matter was *res adjudicata* more than four months prior to bankruptcy and under the Illinois law no party thereto can have said decree vacated or set aside.

Such proceedings having been concluded, and the interest of Dorothea Huszagh conveyed by the consent decree and the Master's sale and assignment more than four months prior to the intervention of bankruptcy, and no claim of fraud or concealment being charged, the Trustee in Bankruptcy cannot be heard with respect to such transfer.

No federal question of law was necessarily involved in the hearing and determination of that issue.

No substantial or important question of law is presented by this record.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This respondent adds the following to correct and complete the petitioner's "Summary and Short Statement of the Matter Involved."

(a) The decree in the original creditor's bill (Rec. 17-23) proceeding adjudicated the rights of this respondent, Fred J. Wegg, as Trustee under the Will of Frederick H. Wickett, Deceased, and Dorothea Huszagh, one of the beneficiaries under said trust, with respect to important matters of accounting between them;

(b) Said decree found that Dorothea Huszagh was indebted to Wegg, Trustee, in the sum of approximately fifty thousand dollars ($50,000.00) as security for which he had the right to withhold distribution of income from said trust which might otherwise be due the said Dorothea Huszagh;

(c) Said decree was *res adjudicata* as to all parties thereto for more than four months prior to intervention of bankruptcy;

(d) Said petitioner, in his bill of review, recognized that rights in said property interest of Dorothea Huszagh may have attached by reason of the sale pursuant to the decree in the creditor's bill proceeding because he prayed, in the alternative (Rec. 31), for a money judgment against Cardwell in the event that Cardwell had conveyed or assigned interest acquired by him under said decree;

(e) Said petitioner alleged no facts entitling him to set aside the accounting between Dorothea Huszagh and Wegg, as trustee, had in said creditor's bill decree, and in no way attacked said accounting;

(f) Dorothea Huszagh in her counterclaim for review did not attack the accounting between her and Wegg, trustee, stated in said creditor's bill decree, and said accounting was *res adjudicata* between all of the parties to the creditor's suit, including Cardwell, more than ten months prior to bankruptcy.

(g) The Illinois Supreme Court (Rec. 154) held that it was not necessary for it to pass on the appeal of Wegg, trustee, from the Appellate Court regarding the accounting, because it ordered the decree of the trial court in the bill of review case affirmed.

(h) No question of fraud or collusion in connection with said creditor's bill proceeding was raised by the peti-

tioner. To the contrary, he denied in open court (Rec. 87) that any such question was presented;

(i) On the trial of the bill of review case the trial court heard evidence and found (Rec. 67) that Dorothea Huszagh, for a good and valuable consideration paid to her by Cardwell, agreed that she would not take any further action concerning the decree entered in the creditor's bill proceeding;

(j) The Supreme Court found (Rec. 153) as a *matter of fact* that there was such a valid agreement between Dorothea Huszagh and Cardwell; that Cardwell could not be placed in *status quo* and, therefore, Dorothea Huszagh is now estopped from litigating the questions involved in the bill of review case;

(k) Contrary to petitioner's statement, the Appellate Court did *not* sustain the title of the trustee under the Bankruptcy Act. In fact, it expressly refused to pass on this question. (Rec. 121.)

THE QUESTION PRESENTED.

The basic question presented to the Supreme Court of Illinois was whether or not Dorothea Huszagh could relitigate the effect of a decree as to which she had contracted away her rights for a valid consideration, and as to this, the Illinois Supreme Court determined that she was estopped. This matter having transpired more than four months prior to the filing of bankruptcy by her and there being no claim of fraud, the case left no federal question for determination.

PROPOSITIONS OF LAW.

If property is not in Bankruptcy Court's possession and a third person asserts a bona fide claim adverse to the Trustee in Bankruptcy, his rights must be determined in a plenary action.

Cline v. *Kaplan,* 323 U. S. 97.

In re Baudouine, 101 Fed. 574 (2nd Cir. Ct. N. Y. 1900).

In such plenary action the interpretation of property rights (particularly when based upon the express terms of a State Statute) rests in the decisions of the State Courts and those decisions are controlling.

Erie v. *Thompson,* 304 U. S. page 64.

Potter v. *Couch,* 141 U. S. 296.

Where the decision of a State Court might have been either on a State ground or a Federal ground, and the State ground is sufficient to sustain the judgment, the Supreme Court will not grant review, even if the Federal law is erroneously interpreted.

Williams v. *Kaiser,* 323 U. S. 471; 65 S. Ct. 363 (367).

Radio Station WOW v. *Johnson;* 65 S. Ct. 1475, 1480; 89 Law Ed. Sup. Ct. Rep. 1397, 1402; 324 U. S. (Number 3 June 18, 1945 page III).

The Illinois Supreme Court passed on the question of fact as to whether or not the transaction between Dorothea Huszagh and Cardwell constituted a valid agreement, and gave effect to the same according to the laws of Illinois. Such agreement having been executed more than four months prior to bankruptcy and there being no claim of fraud, no Federal question is involved.

Blair v. *Brailey,* 221 Fed. 1 (Cir. Ct. 5th Cir. certiorari denied 238 U. S. 638).

The availability of bankrupt's trust income to his Trustee in Bankruptcy is to be determined by the law of the situs of the trust, and the Trustee must bring a plenary action authorized by state law against the party holding an adverse interest, which is the Trustee under the will.

Lockwood v. *Exchange Bank,* 190 U. S. 294.

ARGUMENT.

The petitioner proceeds on the premise that the interest of Dorothea Huszagh under the trust created by her father's will had not been changed or altered by any conduct of her own; as though there had been no intervention of the Cardwell proceeding, and her agreement with Cardwell concerning the transfer of her interest by her consent to the implementation of the decree of the Lake County Circuit Court.

Even assuming that there had been no intervention of creditor's bill litigation or voluntary agreements based on valid considerations, we submit that the federal courts would follow the decisions of the Illinois Supreme Court concerning the "property rights" which the Trustee in Bankruptcy might have in her interest in said trust.

The "property" sought to be reached by the Trustee in Bankruptcy was neither in the actual or constructive possession of the bankrupt nor in the actual or constructive possession of the Bankruptcy Court. *Blair* v. *Brailey*, 221 Fed. 1 (Cert. denied 238 U. S. 638). To bring this property into the Bankruptcy Court, where it could adjudicate the same under the Bankruptcy Act, it would have been necessary to institute litigation.

That litigation would have required the Trustee to go into a state court in a plenary action. (*Cline* v. *Kaplan*, 323 U. S. 97.) When he arrives in the state court he comes there endowed only with the specific rights and powers granted him by the state law and the Bankruptcy Act. Upon his arrival in a plenary action, he would have been faced with the obstacle set up by Section 49, Chapter

22 of the Illinois Revised Statutes, and the decisions of the State courts construing that Statute have consistently been upheld by the decisions of the United States Supreme Court. (*Potter* v. *Couch,* 141 U. S. 296; *Spindle* v. *Shreve,* 111 U. S. 542.) It has not even been a question of conflicting views, the Supreme Court of the United States properly giving effect to the decisions of the courts of last review of the State which is the situs of the property concerning the rights, limitations and immunities of such property.

It is specious for the petitioner to beg the question he seeks to argue, (his petition, page 19) that if the Illinois court's rule as to property not in the bankrupt's possession, and for which a plenary suit must be brought, is correct, then Section 70-C of the Bankruptcy Act imposes on the Trustee the duty to bring an action which could never succeed. Here the Court is presented with a *particular* type of case in which he cannot succeed, and it is only as to this specific situation that the Court is called upon to consider whether he can succeed and not whether any Trustee in any different case ever can succeed in plenary action.

It will not be contended that the United States Supreme Court will take jurisdiction of a cause to sit in judgment upon the correctness of decisions of the Supreme Court of Illinois with respect to property rights which had been conveyed or disposed of, either by voluntary action or by processes of law more than four months prior to the intervention of bankruptcy, and where, as in this case, no question of fraud is involved.

There has been no contrariety of opinion either by State or Federal decisions on the question of the limitations of Section 49 of our Chancery Act establishing a rule of property, and in these circumstances it is not to be presumed that what the legislature had established as a

rule of property creating immunities of trust interests of this nature when attacked by an individual creditor in his own right, would or should be waived or surrendered, and the immunity destroyed simply because the attack is made by a Trustee in Bankruptcy. The limitation and the protection of the statute is attached to the property and not to the nature or character of the particular plaintiff who seeks to reach that property in satisfaction of debt. Every basis of public policy, responsible in the first instance, for the enactment of this legislation must be considered as granting the property interest itself an immunity; and it must follow as a natural corollary that the matter of who may be the plaintiff in a given situation should be of no consequence. The Trustee in Bankruptcy is just as much subject to the public policy of the State of Illinois as an individual creditor. *Lockwood* v. *Exchange Bank,* 190 U. S. 294. To seek to make a federal question out of a matter which is peculiarly within the rights of a State, simply because the person raising the question is an officer under the Federal Bankruptcy Act, is to ask this Court to intervene in a sphere it has consistently refused to invade.

Petitioner seeks to convey the impression that the Illinois Supreme Court has gone counter to its previous decisions in similar cases and cites Illinois cases (petition, page 13) to an effect contrary to that given in this case—and complains that the Court ignored its previous decisions and thus attempts to establish that our Illinois courts are now dubious about the questions involved. The Supreme Court of Illinois properly ignored the cases cited by the petitioner because those cases had no applicability to the situation at hand. Heretofore, counsel for the petitioner vigorously urged them in his own briefs before that Court. In none of those cases was the Chancery Act involved or even raised; in one of the cases there was no trust; in the second, the trust had terminated; and in the third, the beneficiary of the trust brought his interest into the

Bankruptcy Court by scheduling the same in his own schedules.

The petition for certiorari attempts to induce the impression that in the State courts the only question raised concerned the title of the Trustee in Bankruptcy, and therefor it decided a Federal question. Quite to the contrary, the principal question raised was whether or not the creditor's bill proceedings was *res adjudicata;* whether or not, by reason of the contract between Cardwell and Dorothea Huszagh, the latter was estopped from raising the issue. All this having transpired more than four months before the intervention of bankruptcy, it was necessary for the court to make a decision on this issue *before* the court would have any occasion to consider any rights of the Trustee in Bankruptcy. For it must be obvious that if the Court decided the former questions it would have no occasion to even consider the latter question.

And this is precisely what the trial court, as well as the Illinois Supreme Court, did do. The memorandum opinion of the trial Court on the possible title of the Trustee was rendered on motions to strike and before the trial Court had heard any evidence; the final decree, (Rec. 66-67) from which review was sought, having decided that the previous matter was *res adjudicata,* was binding on Cardwell, Dorothea Huszagh and this respondent and found it unnecessary (and properly so) to pass on the latter question. For that reason, also, we respectfully submit, the Illinois Supreme Court, in affirming the Circuit Court on that question, did all that was necessary to finally conclude the litigation. Its discussion of the rights of the Trustee in Bankruptcy was merely dicta. It also may be noted that the final opinion rendered by the trial court in the bill of review case (Rec. 98) and the only notice of appeal filed by the trustee in bankruptcy (Rec. 68-69) showed that no question of bankruptcy law was decided by the

trial court in entering its decree (Rec. 66-67) dismissing for want of equity the trustee in bankruptcy's bill of review. The judgment of the Illinois Supreme Court affirming the decree of the trial court was not predicated on a broader basis than the decree of the trial court.

The Supreme Court will not review a decision of a state court until it affirmatively appears that a federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Supreme Court will not undertake to review it. *Williams* v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 363 (367). And this is so even if the State Court has erroneously interpreted the Federal law. *Radio Station WOW* v. *Johnson*, 324 U. S. (No. 3 Opinion June 18, 1945) 65 S. Ct. 1475 (1480). *Herb* v. *Pitcairn*, 324 U. S. 117, 65 S. Ct. 459 (463).

The United States Supreme Court does not grant the writ of certiorari upon the mere ground that a part of the reasoning of the opinion of the lower court is doubtful although the result is correct. *Tyrrell* v. *District of Columbia*, 243 U. S. 1.

Petitioner seeks to make much of the fact that Dorothea Huszagh's interest was assignable by her and, therefore, it passed to her Trustee in Bankruptcy. The manifest inapplicability of the conclusion to the premise can be demonstrated as follows:

(a) Dorothea Huszagh, for a good and valuable consideration, and more than four months prior to the intervention of bankruptcy, sold her interest to a stranger. Obviously in such circumstances petitioner will not claim that the Trustee in Bankruptcy would have any right to this interest; or

(b) Dorothea Huszagh lost her interest in the trust by a judicial proceeding more than four months prior to the intervention of bankruptcy. Obviously in this situation also her Trustee in Bankruptcy would have no interest; and

(c) Dorothea Huszagh is estopped by reason of a contract based on a valid consideration from seeking to rescind the loss of her interest, and the matter is *res adjudicata* as to her, and had been for more than four months prior to the intervention of bankruptcy. The Illinois Supreme Court has so ruled in a situation in which it must be admitted that the *lex situs* applies. It must be equally obvious that the Trustee in Bankruptcy cannot claim that a federal question is involved simply because he is a Trustee in Bankruptcy.

To Recapitulate:

1. Ten months prior to the intervention of bankruptcy Dorothea Huszagh became divested of her interest in the trust under the will of her father, and this respondent became bound by findings in the decree concerning matters of accounting;

2. The Illinois Supreme Court has held on a mixed question of law and fact that all matters in said action became and were *res adjudicata* more than four months prior to the intervention of the bankruptcy;

3. To ask this Honorable Court to take jurisdiction on the ground that a federal question is involved *merely* through the intervention of bankruptcy more than four months after the transpiration of events, is to ask this Court to exercise a right of review over judicial proceedings and contractual relationships, the determination of which is solely within the purview of the laws of the situs and the State courts having jurisdiction thereof;

4. Every consideration of the facts and the law which warranted the Illinois Supreme Court in finding that Dorothea Huszagh is estopped from having the Cardwell decree vacated (as to which question it will not be denied that the Illinois Supreme Court decision will be respected) must by the same token be definitive of the rights of the Trustee in Bankruptcy where more than four months had elapsed before the filing of the bankruptcy proceedings. This Court will not grant certiorari to review evidence with respect to which the Illinois Supreme Court has made specific findings.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this is not a proper case for review by certiorari and that the petition for such writ should be denied.

Respectfully submitted,

M. MANNING MARCUS,
Attorney for Fred J. Wegg, as the sole Trustee under the last Will and Testament of Frederick H. Wickett, deceased, one of the Respondents.

BARRE BLUMENTHAL,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1945

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Respondents.

BRIEF OF DOROTHEA W. HUSZAGH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

MAURICE P. GOLDEN,
100 West Monroe Street,
Chicago, Illinois,
Attorney for the Respondent,
Dorothea W. Huszagh.

EDWARD G. BEEGLUND,
Of Counsel,
1 North LaSalle Street,
Chicago, Illinois.

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Respondents.

BRIEF OF DOROTHEA W. HUSZAGH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION BELOW.

The opinion below is reported in 390 Illinois Supreme Court Reports at page 526 (advance sheets, 390 Ill. No. 6).

STATEMENT MAKING AGAINST JURISDICTION.

The petitioner improperly substituted a copy of the second opinion of the Illinois Appellate Court in place of

the opinion of the Illinois Supreme Court required by the rules of this court as a part of his petition.

No federal question of law was involved in the matter of the determination by the state trial court and state Supreme Court that consent decrees entered in a creditor's suit, sought to be attacked collaterally, and solely on the ground of a mistake of state law, were, as a matter of state law, *res adjudicata,* more than four months before the filing of a petition in bankruptcy.

The petitioner filed three petitions for certiorari as cases numbered 823, 824 and 825, but he served only one single printed copy bearing all of said numbers on such single copy on counsel for Dorothea W. Huszagh, who has filed in each of said cases her brief in opposition to each of said petitions. The briefs filed on behalf of Mrs. Huszagh are identical, except that the appropriate case numbers are printed on each of the 40 copies filed in this court in regard to each of the three cases. The petitioner, without notice, obtained an extension giving him the maximum time allowed by law to file his petitions for certiorari and serve respondents. At no time has he served this respondent with a copy of the record in any of the cases, although more than twenty days beyond the maximum period of five months since the entry of the judgment of the state Supreme Court have elapsed. It is submitted that petitioner's failure to serve respondents with a copy of the petition and the record filed in each case within the maximum time allowed by statute and rules of this court is, of itself, sufficient ground to deny each of petitioner's petitions.

The only question necessarily involved in the decision made by the state Supreme Court was whether, as a matter of state law, a consent decree can be attacked by a party to such decree solely on the ground of an alleged mistake of law. The bankruptcy act does not purport to grant to

a trustee in bankruptcy any right to attack, on the ground of a mere mistake in state law, a decree of a state court which had become, according to state law, *res adjudicata* more than four months prior to bankruptcy.

The state Supreme Court, in holding that no bill of review would lie either at the instance of the petitioner or at the instance of the counterclaimant, Mrs. Huszagh (the former bankrupt), to set aside the decrees, found as a matter of fact that the decrees were consent decrees and also that for a valuable consideration Mrs. Huszagh, more than four months prior to bankruptcy, had compromised and settled all matters in litigation with Cardwell (judgment creditor) and had agreed not to litigate further any matters pertaining to the creditor's bill proceeding in which the decrees sought to be attacked collaterally were entered.

There is no substantial or important question of law presented by the record. The entire issue below, as far as each of three petitions for certiorari are concerned, is a question of fact in a single case as to whether the decrees sought to be attacked were consent decrees and if, for a valuable consideration, Mrs. Huszagh more than four months prior to bankruptcy had agreed not to file a bill of review. With regard to the facts mentioned, the findings of the trial court were confirmed by the state Supreme Court and this court does not grant certiorari to review findings of fact or to weigh evidence.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner's "Summary Statement of Matter Involved" is inaccurate and insufficient.

Cardwell, having obtained a judgment on personal service against Mrs. Huszagh, and having execution returned *nulla bona,* filed his creditor's bill in the Circuit Court of

Lake County, Illinois, against Mrs. Huszagh and Fred J. Wegg, as trustee under the last will of Frederick H. Wickett, deceased, who was the late father of Mrs. Huszagh. Under the will of Frederick H. Wickett, deceased, a trust estate was created for the support and maintenance of Mrs. Huszagh, a widow, her six minor children and her sister.

In the creditor's bill suit a decree was entered on November 17, 1939 (Rec. 17-23), which found and adjudicated that the court had heard evidence, had jurisdiction over the parties and the subject matter of the suit; that her interest in the trust estate created by her father's will was subject to sale in order to pay Cardwell's judgment. At the time that decree was entered, there was no other judgment against Mrs. Huszagh and no possible question of bankruptcy law was passed on by the state trial court in entering its decree in the creditor's bill suit, more than ten months prior to bankruptcy.

Seven days after the entry of that decree and within term time, during which the Illinois court had a right to vacate the decree on its motion or on motion of counsel, Mrs. Huszagh, with the advice of her attorney, made and entered into an agreement with Cardwell (Rec. 81-88) pursuant to which for a valuable consideration she agreed that the decree of sale entered in the creditor's suit be carried out according to its intent, which required a sale of Mrs. Huszagh's beneficial interest in the trust at public vendue, and that Mrs. Huszagh would not litigate the matters involved in the creditor's suit further and, in particular, that she would not take an appeal or file a bill of review to attack the decree. Upon advertisement, the sale was carried out, a report of sale was made to the court and, by agreement between the attorneys for Mrs. Huszagh and Cardwell, the judgment creditor, the report of sale was approved ten months before bankruptcy.

In his agreement with Mrs. Huszagh, Cardwell agreed to satisfy the judgment he had obtained at law in another case, irrespective of the amount realized at the master's sale; that if there was an overplus at the master's sale, it would go to Mrs. Huszagh; that Cardwell, in any event, would pay the costs of the proceeding, including master's fees, commissions and expenses (Rec. 81-88). The agreement between Mrs. Huszagh and Cardwell was fully executed (see Opinion of trial court (Rec. 98) and final decree of trial court in bill of review case (Rec. 66-67), and Opinion of Illinois Supreme Court in regard to which having not been served with a copy of the record we cannot cite by the page).

After the entry of the decree approving the master's report of sale in the creditor's suit, a deficiency decree was entered in another case against Mrs. Huszagh with regard to a bond issue (Rec. 77) which she had signed fifteen years ago as an accommodation maker, and such deficiency decree was the only basis of the claim filed in her bankruptcy proceeding.

The petitioner, as the trustee in bankruptcy, a few days less than a year after the decree of sale had been entered in the creditor's suit, filed his bill of review in the Circuit Court of Lake County, Illinois, against Mrs. Huszagh, Cardwell and Fred J. Wegg, as trustee under the will creating the trust, seeking to set aside the two decrees in the creditor's suit solely on the ground that such decrees were entered as a matter of mistake of law because they countervened the provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes.

The state trial court (Rec. 66-67) and state Supreme Court held that no bill of review would lie to set aside consent decrees on the ground of a mistake of law; that Mrs. Huszagh and the petitioner claiming through her, after the lapse of more than four months, were estopped

from maintaining a bill of review by the agreement Mrs. Huszagh made with Cardwell. The opinion of trial court in bill of review case shows that no question of bankruptcy law was involved (Rec. 98) and the decree of the trial court in the case last mentioned does likewise (Rec. 66-67). The state Supreme Court affirmed this decree.

The decree of sale in the creditor's suit is of vital interest to Mrs. Huszagh because it adjudicated (Rec. 17-23) the account between her and Fred J. Wegg, as trustee under her late father's will. According to the will of Mrs. Huszagh's late father, Fred J. Wegg, trustee (Rec. 15), is authorized to give any part of the trust estate to any relative in need, which would include any or all of the six minor children of Mrs. Huszagh. In another suit to construe the will of Mrs. Huszagh's father, the trustee in bankruptcy, although he has not established any right to take the beneficial interest formerly owned by Mrs. Huszagh in the trust estate, has taken what counsel for this respondent regards as a hostile attitude to the rights of Mrs. Huszagh's children. The pendency of another suit is *de hors* of the record in this case, and although it exists in fact it may be treated in this brief only as a possibility in this case. With these facts mentioned, any attack on Mrs. Huszagh for opposing, as she is entitled to do by law (*In re Barnett*, 124 F. (2d) 1005), the three petitions for certiorari filed, more readily may be shown to be immaterial to the consideration of the merits of petitioner's petitions, which must be based on the record herein.

ARGUMENT.

The cross-complaint for review of Mrs. Huszagh, seeking to set aside the decrees in the creditor's bill suit, was predicated (Rec. 43) upon the theory that her interest in the active trust estate created by the last will of her late father for her support and benefit was a spendthrift trust, and being a spendthrift trust Mrs. Huszagh could make no agreement relating to her interest which would operate as a transfer of her interest to Cardwell. At no time in the state court proceedings did Mrs. Huszagh in any way seek to repudiate the agreement which she made and entered into with Cardwell, wherein for a valuable consideration she agreed not to contest further the matters involved in the creditor's suit and, in particular (Rec. 82), not to file a bill of review. The only ground urged by her is although she made such an agreement for a valuable consideration, such agreement pertained to an interest in a spendthrift trust, which she could not transfer or in any wise alienate by her own agreement. If such contention were not correct, then her counsel does not dispute the rule of law well established in Illinois and in federal courts to the effect that a bill of review does not lie to impeach a consent decree. *Harding* v. *Harding,* 198 U. S. 317. The only ground upon which the controlling effect of this rule of law would not be applicable to the facts in the case at bar is on the ground that the nature of Mrs. Huszagh's interest in the trust estate was such that she was not competent to make a contract concerning it.

The trial court (Rec. 66 and 98) and the state Supreme Court, and its opinion, (since the petitioner never served a copy of the record on this respondent, our reference to

state Supreme Court's opinion cannot cite the record page of such opinion) specifically found that the interest was of a character concerning which Mrs. Huszagh was competent to make a contract and that she was bound by her agreement. The Appellate Court of Illinois found that Mrs. Huszagh was bound by her agreement, but held that her trustee in bankruptcy, although more than four months had elapsed since the time of the making of her agreement and the filing of her petition in bankruptcy, was not bound by such agreement. The agreement, according to Illinois law, when made in term time (*Bushnell* v. *Cooper*, 289 Ill. 260, 267), if binding on Mrs. Huszagh made the decree in the creditor's suit sought to be attacked a consent decree, and made the decree *res adjudicata* more than four months before the filing of a petition in bankruptcy. (*Hempstead* v. *Broad*, 275 Ill. 358, 365.) It is anomaly in legal theory for a court to hold that an agreement is legally binding on the parties to the agreement but not on a party claiming after the lapse of more than four months thru one of the parties to such an agreement when the good faith of the agreement is admitted (Rec. 87). There is no provision of the bankruptcy law which, after the lapse of four months, entitles the trustee in bankruptcy to nullify a bona fide agreement which the court finds was legal and valid, and still binding on the parties to such agreement. A decree in a non-bankruptcy court, predicated on the validity of a lien arising before the four months' period, is *res adjudicata* in a bankruptcy court or in a plenary suit filed by the trustee in bankruptcy in the state court.

On behalf of Mrs. Huszagh it is contended that the express provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes, as repeatedly construed by the Illinois Supreme Court and the United State Supreme Court create a rule of property and not merely a rule of procedure; (*Potter* v. *Couch*, 141 U. S. 296, 319; *Spindle* v. *Shreve*, 111 U. S. 543, 548) that the effect of that statute, which

has been in force continuously since 1845, was to make any active trust created in good faith by a resident of Illinois for the support and maintenance of another not subject to the payment of the debts of the beneficiary. This is clearly shown in the recent decision of *Knight* v. *Gregory*, 389 Ill. 554, 561, construing the statute in question. In the case last mentioned, the state Supreme Court stated that the interest of the beneficiary in a trust of the character mentioned, by virtue of the provisions of the Illinois statute, is just as exempt from the payment of debts of a beneficiary as is an interest in a typical so-called spendthrift trust.

The effect of the Illinois statute has been stated by the author in 119 A. L. R. 41 as follows:

> "* * * the effect of the statute appears to be to make all trusts, except those for the benefit of the settlor, spendthrift trusts as against creditors of the beneficiary."

The petitioner ignoring the nature of his bill of review as a collateral attack and assuming that he is trying the merits of the creditor's suit *de novo*, contends that the decision of the Illinois Supreme Court "is contary to *Eaton* v. *Boston Safe Deposit and Trust Company*, 240 U. S. 427." This case has been cited by this respondent in support of the decision of the Illinois Supreme Court because Justice Holmes stated at pages 428, 429, in the court's opinion that:

> "It is established law in Massachusetts that such trusts are valid and effective against creditors, *Broadway National Bank* v. *Adams*, 133 Massachusetts, 170, and, subject to what we are about to say, against assignees in insolvency or trustees in bankruptcy. *Billings* v. *Marsh*, 153 Massachusetts, 311. *Munroe* v. *Dewey*, 176 Massachusetts, 184. The trustee in bankruptcy seeks to avoid the effect of these decisions on the ground that Mrs. Luke's equitable life interest was held by the Supreme Court of the State to be assign-

able, and that therefore it passed under § 70a (5) of the Bankruptcy Act, vesting in the trustee all property that the bankrupt 'could by any means have transferred.' The Supreme Judicial Court, however, held that the above cited cases governed and that the property did not pass. 220 Massachusetts, 484.

* * *

"The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it. *Dunn* v. *Dobson*, 198 Massachusetts, 142, 146. *Lathrop* v. *Merrill*, 207 Massachusetts, 6, 9. Whatever may have been the criticisms upon the policy and soundness of the doctrine, and whatever may be the power of this court to weigh the reasoning upon which it has been established by the Massachusetts cases, *Page* v. *Edmunds*, 187 U. S. 596, 602, it has been established too long and is too nearly sanctioned by the decisions of this court to be overthrown here. *Nichols* v. *Eaton*, 91 U. S. 716. *Shelton* v. *King*, 229 U. S. 90, 99. The policy of the Bankruptcy Act is to respect state exemptions, and until the Massachusetts decisions shall have gone farther than they yet have we are not prepared to say that the present bequest is not protected by the Massachusetts rule."

The petitioner refers in his petition not to what was the actual decision of this court in the case last mentioned, which affirmed the judgment of the Massachusetts Supreme Court, but he quotes a part of the discussion in the opinion which is in no wise applicable to the case at bar and which might relate to a case in which the bankrupt "could have freed from the trust *both the fund* and any proceeds received by her." In the case at bar, no one contends that Mrs. Huszagh "could have assigned her interest and by so doing could have freed from the trust *both the fund* and any proceeds received by her." According to the will of her late father (Rec. 15) creating the trust, Mrs. Huszagh's interest in the trust was a contingent interest, dependent not only upon her

continuing life but also dependent upon whether the trustee under the will would give away the corpus to a relative of the testator in need. Under the terms of her father's will, never could Mrs. Huszagh have freed the fund from the trust. Furthermore, in the case at bar the Illinois Supreme Court determined that the proper construction of Section 49 of Chapter 22 of the Illinois Revised Statutes "as limiting the character of the equitable property and inherent in it" with regard to the equitable interest of Mrs. Huszagh in the trust created by her late father's will. This court follows the construction of a state statute as made by the state Supreme Court.

As stated at page 946 of Collier's Bankruptcy, Vol. 4 (14th Edition):

> "The courts are frequently moved to reassert the general rule that the act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or his creditors at the time the trustee's title accrues."

The petitioner contends that the decision of the Illinois Supreme Court to the effect that Mrs. Huszagh was estopped by her agreement made with Cardwell ten months before bankruptcy was correct in so far it relates to Mrs. Huszagh, and, therefore, he cannot contend logically that he derived any right under Section 70a(5) from Mrs. Huszagh who had bargained away her right ten months before bankruptcy. The only right, if any, which would be left to the petitioner was the right similar to that of a judgment creditor under Section 70c of the bankruptcy act. However, the petitioner also contends that a judgment creditor in Illinois has no right to subject the former interest of Mrs. Huszagh to the payment of a judgment; and he, therefore, disclaims any rights under Section 70c of the bankruptcy act. Having no rights to maintain an adverse plenary suit against Wegg, as trustee under the

will, or against Cardwell, or Mrs. Huszagh, who has received her discharge in bankruptcy (Rec. 96) under Section 70c, and since Mrs. Huszagh had no title to her interest in the trust to give the petitioner at the time she filed her petition in bankruptcy, the Illinois Supreme Court was right in holding that the petitioner had no right to maintain his bill of review.

The discussion which the Illinois Supreme Court made in its opinion of the bankruptcy act was not the basis of its judgment, which held that under the state law a consent decree made ten months before bankruptcy could not be set aside on the sole ground of an alleged error of law. The opinion of any court is not broader than the facts in a particular case in which it is rendered. However, it is submitted, the scope of section 70c of the bankruptcy act was correctly delineated in the opinion of the Illinois Supreme Court.

The purpose of Section 70c is set forth in a note prepared by its draftsmen—and appearing at 45 Cong. Rec. 2277 (1910). (Reproduced in Collier, 14th Ed., Vol. 4, page 1252, as follows:)

> " 'The proposed amendment, while correcting the defect named, (secret liens) at the same time carefully guards the rights of all parties. It is evident that in the proposed amendment attempt is made to give effect to two ideas, quite distinct: First, that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under state law; and, second, that *as to property not in the custody of the bankruptcy court, the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an individual creditor might have done to subject assets. In this way, in effect, proceedings in bankruptcy will give to creditors the same rights that*

creditors under the state law would have had had there been no bankruptcy, and from which they are debarred by the bankruptcy—certainly a very desirable and eminently fair position to be granted to the trustee.' 45 Cong. Rec. 2277 (1910)." (Matter in parenthesis and italics added.)

The state Supreme Court, in applying Section 70c with respect to the trust interest of Mrs. Huszagh did just as the draftsmen intended. The court decided that "in effect, proceedings in bankruptcy will give to creditors the same rights that creditors under the state law would have had had there been no bankruptcy, * * *." Petitioner not only concedes, but, in fact, he predicated his bill of review on the sole premise that because of the effect of Section 49 of Chapter 22 of the Illinois Revised Statutes no creditor in Illinois could subject the interest of Mrs. Huszagh in the trust to the payment of a judgment.

It would create an anomalous situation fraught with many difficulties to mix indiscriminately the matter of remedies with the matter of property rights, with avowed intention of cutting down a bankrupt's property rights under state statutes and decisions by giving to the trustee in bankruptcy greater remedies as plaintiff in a plenary suit filed by him in the state court than would be afforded any other plaintiff of any kind or description whatsoever, with the net result that an interest in a trust estate, which under the Illinois laws could not be taken for the payment of a debt, could be taken in a plenary suit for the payment of a debt only by a trustee in bankruptcy. It always has been the policy of Congress in enacting all bankruptcy laws to respect property rights created by state law. In such states as recognize the validity of spendthrift trusts, the courts recognize the particular character or property right of such interest and will not permit the trustee in bankruptcy to recover it. The property right given to the beneficiary in a trust within the purview of

Section 49 of the Illinois Chancery Act is just as sacred in contemplation of the bankruptcy law as would be the same right if it were merely defined categorically in the instrument creating the trust, as immune from liability to pay debts. Under the laws of the State of Illinois, it is just as free from liability to pay debts as an interest in a trust specifically characterized in the instrument creating the trust, as a property right free from any liability to pay the debts of the beneficiary. (*Knight* v. *Gregory*, 389 Ill. 554, 561.) The will of Mrs. Huszagh's father creating the trust must be read in contemplation of the then existing Section 49 of Chapter 22 of the Illinois Revised Statutes to the same extent as if the testator quoted the statute last mentioned in his will.

The petitioner cannot argue properly that the interest of a beneficiary in a spendthrift trust, or any trust created in good faith by a person other than the beneficiary made just as immune from the attacks of a creditor as a spendthrift trust by virtue of the public policy of the State of Illinois as evidenced by Section 49 of Chapter 22 of the Illinois Revised Statutes, can be taken, administered and sold by a trustee in bankruptcy of the beneficiary. There is no basis in the bankruptcy law for discrimination between interests in trusts of the character just mentioned, which have the common characteristic of not being subject to be taken for a debt of the beneficiary. If there were any difference, the stronger case is made for the trust within the purview of the state statute. Furthermore, such a question was not presented by the facts in the case at bar to the Illinois Supreme Court, which held that the consent decrees in the creditor's suit could not be attacked collaterally for a mistake of law after the lapse of four months before bankruptcy. The primary question before the Illinois Supreme Court was the validity of the consent decrees attacked collaterally. The petitioner argues his case in his petition as if he were trying the creditor's suit

de novo in his bill of review, which he cannot do according to the judgment of the Illinois Supreme Court.

The United States Supreme Court, in the matter of construing the force and effect of Section 49 of Chapter 22 of the Illinois Revised Statutes, follows the decision of the Illinois Supreme Court. (*Erie* v. *Thompson,* 304 U. S. 64; *Page* v. *Edmunds,* 187 U. S. 596, 602.)

In any case, the question of the availability of a bankrupt's trust income to the trustee in bankruptcy is to be determined by the law of the situs of the trust, and the trustee must bring a plenary action authorized by the state law against the party holding an adverse interest and the trustee of the trust estate. (*Cline* v. *Kaplan,* 323 U. S. 97; *In re Baudouine,* 101 Fed. 574; *In re Whitney,* 113 F. (2d) 426, 428, 429). In the case last mentioned, the Circuit Court of Appeals of the Second Circuit stated at pages 428-9 of its opinion:

> "* * * The interest of a *cestui* in a trust is not like an interest in a stock exchange seat. * * *
>
> "The property in the hands of the Fiduciary Trust Company was not in the actual or constructive possession of the bankruptcy court. That company was an adverse claimant entitled to litigate its claims in the prior state court suit without interference from the bankruptcy court."

In the case of *In re Allee,* 55 F. (2d) 76, at page 77, the Circuit Court of Appeals stated:

> "This court has held that such trustee (in bankruptcy) is not to be considered as a purchaser for value, but that his powers, rights, and title are the same as any other judgment creditor, who holds a returned and unsatisfied execution, and that he cannot in any case take property not belonging to the bankrupt."

In *Cline* v. *Kaplan,* 323 U. S. 97, in an opinion by Justice Frankfurter, this court stated in its opinion:

> "If the property is not in the court's possession and a third party asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated in suits of the ordinary character, with the rights and remedies incident thereto."

Suits of "an ordinary character and with the rights and remedies incident thereto" would not sanction the granting of relief to a trustee in bankruptcy as the plaintiff in a state plenary suit not available to any other plaintiff in any other case in such state court.

Nearly all property of a bankrupt not subject to the claims of creditors can be transferred or in some manner alienated by him. The United States Supreme Court will construe the state statute to give an interest in a trust, within the statute, a different character, not inherent in it. The right of homestead, rights to insurance in favor of widows, and the like, can be released by the bankrupt, but the trustee in bankruptcy cannot claim them under Section 70a(5) of the bankruptcy act as property which the bankrupt by any means could have transferred, in case where the state statute makes such interests immune from the claims of creditors. There are a number of so-called "rights" of a bankrupt which more than four months prior to bankruptcy the judgment debtor could compromise, settle or alienate, in good faith, for a valuable consideration, which do not pass to a trustee in bankruptcy. It has been held that since a creditor under state law cannot avoid the assignment of mere expectancy, his trustee in bankruptcy cannot do so. (*In re Barnett*, 124 F. (2d) 1005) (2nd Cir. Ct. of Appeals.) The mere expectancy could not be taken for the payment of a debt at the time it was assigned, and at a later date although the expectancy changed, the trustee in bankruptcy could not set aside the assignment.

A contingent attorney's fee not fully earned is not property which passes to the trustee in bankruptcy, although

the court held that it was assignable, or could be compromised or released. (*In re Coleman, Attorney*, 87 F. (2d) 753.) The fee of a trustee is not fully earned until the estate is closed, and does not pass to the trustee in bankruptcy. (*In re Furness*, 75 F. (2d) 965) (2nd Cir. Ct. of Appeals.)

The petitioner contends that Mrs. Huszagh could have assigned her interest in the trust created by her father's will and, therefore, it "passed" to the trustee in bankruptcy. However, the flaw in his argument is obvious because the interest was in Cardwell more than ten months before bankruptcy and did not pass from Cardwell to the trustee in bankruptcy when Mrs. Huszagh filed her voluntary petition in bankruptcy. Furthermore, if Mrs. Huszagh could assign or transfer her interest, there is no basis for the contention that by virtue of her agreement with Cardwell, which she had a right to make, with the advice of her counsel, according to the Illinois Supreme Court, she did not transfer. (*Hudnall* v. *Ham*, 183 Ill. 486.) If her interest were to any extent transferable and were not an interest in a typical spendthrift trust, she could make by contract a consent decree just as well as she could make a bill of sale or other written assignment. (*King* v. *King*, 215 Ill. 100, 115, 119.) However, in the case at bar. Mrs. Huszagh could not transfer any right to the trust *res* (see Will, Rec. 12-15) within the dictum of *Eaton* v. *Boston Safe Deposit and Trust Company*, 240 U. S. 427. The case at bar is stronger against the petitioner than the actual decision of the Court in the case last mentioned, because in the case at bar the state Supreme Court construed the effect of an Illinois statute as effecting the immunity or particular character of the interest of Mrs. Huszagh in the trust; and the United States Supreme Court adopts the construction placed upon an Illinois statute by the Illinois Supreme Court. Furthermore, in the case at bar the creditor's bill suit cannot be tried *de novo* by the petitioner's bill of review, and consent decrees entered more than

four months before bankruptcy, not set aside by the judgment of the Illinois Supreme Court, will not be set aside by this court, because no question of bankruptcy law was involved in the matter of entering the decrees in the creditor's suit.

In the case at bar, we are not met with a mere judicial construction of the common law of the State of Illinois as to whether the interest of Mrs. Huszagh passed to Cardwell more than ten months prior to bankruptcy, and did not pass to her trustee in bankruptcy when Mrs. Huszagh filed her petition in bankruptcy. By virtue of the express provisions of Section 49 of Chapter 22 of the Illinois Revised Stautes, we are met with a construction of a state statute, the effect of which is to make the interest of the beneficiary in the trust of the character created by the last will of Mrs. Huszagh's father immune from claims of all judgment creditors or other debts and, therefore, *ipso facto* immune from the claim of the trustee in bankruptcy, who is merely the *alter ego* of a creditor. The immunity of the interest in the Illinois trust created by another is just as inherent in it as is the immunity of an interest in a typical spendthrift trust. The trustee in bankruptcy contends that the interest, as far as it pertains to current income, may be transferred by the beneficiary, but, if so, he fails to grasp the fact that the beneficiary can consent in another lawsuit concluded more than ten months prior to bankruptcy to waive her immunity for a valuable consideration. In fact, the petitioner argues that the interest is immune as to any creditor, unless such creditor have as his intercessor in a plenary suit in an Illinois court the trustee in bankruptcy. Without any claim filed in bankruptcy, a trustee in bankruptcy could not maintain suit to recover alleged assets of the bankrupt. He does not function for his own benefit, but for the benefit of creditors, who have filed a claim. In the case at bar, the petitioner goes further than merely erroneously seek-

ing to maintain a *de novo* suit regarding Mrs. Huszagh's interest; he contends that he can set aside judicial proceedings concluded in good faith more than four months prior to bankruptcy, which had become *res adjudicata* as to the bankrupt more than four months prior to bankruptcy. In other words, the petitioner contends that the trustee in bankruptcy is given a right to proceed in a plenary suit in a state court, and, according to the state law, which would not redound under any circumstances whatsoever, to any other plaintiff in any other case. He seeks to revamp by forced construction, Section 49 of Chapter 22 of the Illinois Revised Statutes to read in effect that it is the intention of the State legislature that this section shall have no application to any suit brought by a trustee in bankruptcy. However, the rule created by the statute mentioned is not a rule of procedure depending upon what party is the plaintiff, as the petitioner contends, but is a rule of property which applies to all litigants, whether such litigant be a trustee in bankruptcy or a judgment creditor representing himself.

It has repeatedly been held by the United States Supreme Court and courts of various jurisdictions that an interest in a trust estate which, according to the law of the state in which such interest was created and in which the bankrupt was domiciled, was not subject to the payment of his debts, is not of a character which passes to a trustee in bankruptcy. In the case at bar, this would be readily admitted by counsel for the petitioner as to the spendthrift trust. The character of the label attached to such interest in the Illinois trust protected by the Illinois statute is immaterial. As far as the bankruptcy act is concerned, there is no more difficulty incurred in holding that the interest of a beneficiary in a trust protected or construed as within the purview of Section 49 of Chapter 22 of the Illinois Revised Statutes, does pass to a trustee in bankruptcy, than there is to hold that the in-

terest in a typical spendthrift trust does not pass to the trustee in bankruptcy. In some states spendthrift trusts are not recognized as valid, but in Illinois and other states where they are valid the interest in such trust does not pass to a trustee in bankruptcy. Even if there had been no creditor's bill proceeding, the petitioner has no right to succeed in a plenary suit in the state court against the beneficiary and the trustee under the will creating the trust, protected against the claims of creditors by virtue of Section 49 of Chapter 22 of the Illinois Revised Statutes. The interest of the beneficiary in the trust estate, in the case at bar, by virtue of Section 49 of Chapter 22 of the Illinois Revised Statutes, is just as immune from the claim of creditors as is the interest of a beneficiary in a typical spendthrift trust. (*Knight* v. *Gregory*, 389 Ill. 554, 561.) By judicial proceedings in a state court the trustee in bankruptcy seeks to take for the benefit of the single creditor represented by him, as trustee in bankruptcy, the identical interest in a trust which, he argues, is protected by the positive enactment of the Illinois statute from the claims of all creditors in any sort of an action in any court in the state of Illinois. The Illinois statute does not purport to discriminate in favor of a creditor represented by a trustee in bankruptcy.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes, which must be read as if incorporated in every will creating in good faith a trust for support of another since the time this statute was passed in 1845, is a rule of property characterizing the beneficiary's interest in such trust. This principle was recognized in the case of *Potter* v. *Couch*, 141 U. S. 296, 312; *Spindle* v. *Shreve*, 111 U. S. 543, 548; *Hull* v. *Farmers Loan & Trust Co.*, 245 U. S. 312, as well as *Eaton* v. *Boston Safe Deposit & Trust Co.*, 240 U. S. 427. However, the question of the immunity of Mrs. Huszagh's interest was not before the state Supreme Court for its determination, because the Supreme

Court of Illinois held that for a valuable consideration the beneficiary in the trust could waive or release her immunity and that Mrs. Huszagh had done so more than ten months before bankruptcy. The fact that Mrs. Huszagh, as the beneficiary in the trust created by her father's will, could release her interest in the trust for a valuable consideration in a consent decree is not synonymous with a holding that interest so released was not within the purview of statutory created immunity. Furthermore, if there were no statutory immunity from liability to pay debts attached to Mrs. Huszagh's interest, then no error of law, aside from any question of consent, was incurred in the creditor's suit. The petitioner contends that every creditor except himself was barred by such immunity, but he was not a party to the creditor's suit. The agreement for release was made ten months before bankruptcy and related to a subject matter concerning which the Illinois Supreme Court stated that she was competent to contract. If Mrs. Huszagh's interest in the trust created by her father's will was not a matter concerning which she was competent to make a contract with Cardwell, it certainly was not an interest which could be transferred by her. The judgment of the state Supreme Court to the effect that she made a valid contract with Cardwell ten months before bankruptcy was the determination of a question of state law, which this court will not review. It related to proceedings concluded ten months before bankruptcy.

Section 70a of the bankruptcy act does not define exemptions and does not purport to create substantive rights and formerly non-existing remedies in favor of the trustee in bankruptcy, (*Holden* v. *Stratton,* 198 U. S. 202; *Steele* v. *Buel,* 104 Fed. 968) which in any wise would militate against or change the construction of the Illinois statute, namely, Section 49 of Chapter 22 of the Illinois Revised Statutes, relating to the character of the beneficiary's interest in a trust estate created in good faith by someone

else for the support and maintenance of another person. It is a confusion of thought to call any kind of a claim a "right" and then, upon the basis of such alleged "right" to contend that property rights under the Illinois statute have been changed. A trustee in bankruptcy, by virtue of the bankruptcy act, is given such specific powers as are therein enumerated, but there is no provision in the act which purports to make property not in the hands of the bankrupt but held in trust for him and others on an active trust amenable to the payment of bankrupt's debts, as represented by the trustee in bankruptcy, when a particular interest in the trust property is immune, by reason of the positive enactment of the state law, from the claim of any creditor. The filing of bankruptcy did not change the effect and validity of a state court's decree in the creditor's suit, which, according to the holding of the Illinois Supreme Court, had become *res adjudicata* more than four months before it was attacked by the petitioner's bill of review.

Petitioner contends that the decrees in the creditor's suit, which both he and Mrs. Huszagh attacked collaterally, petitioner by his bill of review and Mrs. Huszagh by her counterclaim for review, should be regarded as binding upon Mrs. Huszagh, but since Mrs. Huszagh ten months later filed her petition in bankruptcy, the identical decrees, as a matter of law, should be regarded as "changed" by the bankruptcy act, only as far as the rights of the petitioner are concerned. The correctness of the decrees in the creditor's suit, at the time they were entered, was a question to be determined solely by state law, and the only ground upon which the petitioner attacks the correctness of such decrees as of the time they were entered was that they were entered in contravention of the state statute, namely, Section 49 of Chapter 22 of the Illinois Revised Statutes. Not only was the correctness of the decrees, when entered, in the creditor's suit a question of state law,

but the question of the correctness of such decrees when attacked collaterally still remains solely a question of state law and their validity still relates back to the time of their entry which was ten months prior to bankruptcy. The state Supreme Court decided only a question of state law when it held that such decrees could not be attacked collaterally by the petitioner's bill of review or by Mrs. Huszagh's counter-claim for review. If the Supreme Court merely had denied relief to the trustee in bankruptcy and had given relief to Mrs. Huszagh, then it would have decided that there was error in the trial court's decree. By affirming the trial court's decree the state Supreme Court held that the decree was valid at the time of its entry.

It is not true, as petitioner argues, that the section of the Illinois Statute mentioned pertains only to creditors' suits. It is not a mere rule of procedure but a rule of property, and the interest is immune from the claims of creditors no matter what is the form of judicial procedure, whether in equity or at law. *Potter* v. *Couch*, 141 U. S. 296, 319; *Dunham* v. *Kauffman*, 385 Ill. 79; *Baumgarden* v. *Reconstruction Finance Corporation*, 131 Fed. (2d) 741.

If it still be argued that Section 49 of Chapter 22 of the Illinois Revised Statutes appertains only to matters of procedure and not to matters of substance, then it must be borne in mind that according to the laws of the State of Illinois no bill of review lies to correct a decree only on the ground of alleged error in procedure. *Vyverberg* v. *Vyverberg*, 310 Ill. 599; *Knaus* v. *Chicago Title and Trust Company*, 365 Ill. 588, 592, 593; *Cullen* v. *Stevens*, 389 Ill. 35.

The United States Supreme Court from the time of its foundation has adhered to the principle that it will not review judgments of the state court that rest on adequate and independent state grounds, and that it will not use

its power merely to correct allegedly wrong judgments, and to revise opinions. The state Supreme Court by affirming the trial court decree, refused to set aside a former decree of the trial court, attacked collaterally, and in so doing it decided a question of state law which previously had been determined ten months before bankruptcy and therefore, did not involve and could not involve any question of bankruptcy law.

Mrs. Huszagh filed no petition for a writ of certiorari in this court because her counsel is of the opinion that no federal question was involved in the decision of the Illinois Supreme Court. If there was an error in judgment of the State Supreme Court such error only affected the rights of Mrs. Huszagh, which she has sought to protect throughout the litigation.

CONCLUSION.

No question of federal law is involved in this cause, and each of the three petitions for writ of certiorari in cases 823, 824 and 825 should be denied.

Respectfully submitted,

MAURICE P. GOLDEN,
Chicago, Illinois,
Attorney for the Respondent,
Dorothea W. Huszagh.

EDWARD G. BERGLUND,
of Chicago, Illinois,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 824

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF DOROTHEA W. HUSZAGH,
Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH AND FRED J. WEGG, AS THE SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED,
Respondents.

BRIEF OF JAMES R. CARDWELL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION BELOW.

The opinion below is reported in 390 Illinois Supreme Court Reports at page 526 (advance sheets, 390 Ill. No. 6), and is set forth in full in the appendix hereto. It also appears (Rec. pp. 125-132).

STATEMENT MAKING AGAINST JURISDICTION.

Petitioner has not appended to his petition a copy of the opinion of the Supreme Court of Illinois, as required by rule 12, paragraph 1, of this court. Contrary to the rules

of this court, petitioner annexed to his petition a copy of the second opinion of the Illinois Appellate Court. Petitioner has not furnished an index to the record of the Illinois Supreme Court.

There was an adequate and independent non-federal ground of decision to support the judgment of the state Supreme Court. The advent of bankruptcy *ipso facto*, occuring more than four months after the entry of the decrees sought to be attacked, collaterally, solely on the ground of an alleged error of law (Rec. 27), in no wise affected the vadility of such decrees. The sole issue sought to be raised in the trustee in bankruptcy's bill of review was whether, making particular reference to Section 49 of Chapter 22 of the Illinois Revised Statutes (Rec. 27-29; 129) the trial court in the creditor's suit committed an error of law in entering the decrees it entered in that case. No contention was made in any state court that the bankruptcy act was repugnant to the particular Illinois statute involved. The state Supreme Court affirmed the decree of the trial court dismissing for want of equity not only the complaint for review of the trustee in bankruptcy but also the counterclaim for review of Mrs. Huszagh filed in the identical suit; and the gist of its decision was that if there were any error of law committed by the state trial court in entering the decrees in the creditor's suit, a bill of review would not lie at the instance of the trustee in bankruptcy nor at the instance of the judgment debtor, because such decrees were entered more than four months prior to bankruptcy, and pursuant to an agreement made between Mrs. Huszagh (the former judgment debtor) and Cardwell (the former judgment creditor), which, as stated in the opinion of the state Supreme Court, "related to matters in which they were both competent to contract and resulted in the decrees entered by the trial court, becoming consent decrees" (Rec. 132).

The construction which the Illinois Supreme Court placed upon Section 49 of Chapter 22 of the Illinois Revised

Statutes (Rec. 130) related to the interpretation of an Illinois statute in regard to which the federal court would follow the state Supreme Court. The gravamen of the decision was to the effect that a consent decree made, as stated in the state Supreme Court's opinion (Rec. 132) between "parties competent to contract" and in regard to which "Cardwell could not be placed in *statu quo*" (Rec. 132) made the attacked decree *res adjudicata* more than four months prior to the advent of bankruptcy and Mrs. Huszagh, or anyone claiming thru her, after the lapse of more than four months was estopped (Rec. 132) from seeking to attack collaterally the consent decrees solely on the ground of an alleged error of law. Whether the decrees were consent decrees was a question of fact found by the trial court and confirmed by the Illinois Supreme Court, in regard to which this court does not grant certiorari to review.

No substantial or important question of law is presented by this record.

The entire issue below was one of fact.

As a further ground for showing that this court lacks jurisdiction, it should be noted that the petitioner filed three petitions for certiorari, Cases No. 823, 824 and 825. He only has served counsel for James R. Cardwell with a single copy of only one petition and a single copy of the record which bore all three case numbers on it. No order consolidating the three petitions has been entered, and the service of only one copy does not comply with the jurisdictional requirement of service of a copy of petition for certiorari on counsel for the respondent within ten days from the filing of each of such petitions in this court. In the absence of an order of consolidation in this court, each petition for certiorari stands as a separate case on its own merit as far as meeting the jurisdictional requirements of this court, including the matter of serving counsel for the respondents, is concerned.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner's "Summary Statement of the Matter Involved" is incorrect, incomplete and misleading.

On October 11, 1939, James R. Cardwell, a judgment creditor, filed in the Circuit Court of Lake County, Illinois, his creditor's bill (Rec. 5) making Dorothea W. Huszgah and Fred J. Wegg, as trustee under the last will and testament of Frederick H. Wickett, deceased, parties defendant thereto. In the pleadings filed in the creditor's bill suit, no mention was made of Section 49 of Chapter 22 of the Illinois Revised Statutes, which protects certain types of interests in active trusts created by another in good faith for continuing support of the beneficiary from being subjected to the payment of the debts of the beneficiary by any proceeding at law or in equity brought by a creditor. Dorothea W. Huszagh, in her answer (Rec. 15-17) to the creditor's bill, as a defense to the same alleged that the trust created by her late father's will was a spendthrift trust and as such was not subject to be taken for the payment of any judgment against her thru a creditor's bill. The court heard evidence but no transcript of evidence was preserved in the creditor's bill suit, the preservation of such evidence was not necessary under the Illinois law to sustain the validity of the decree.

On November 17, 1939, the state Circuit Court in the creditor's suit entered a decree of sale in which it was specifically found and decreed (Rec. 17-18) that the court had jurisdiction over the parties and the subject matter; that the trust in question was not a spendthrift trust and it was subject to be sold at public vendue to pay the judgment of Cardwell. The state statute cited (Sec. 49 of Chap. 22 Ill. Rev. Stat.) purports to protect only the interest of a beneficiary in a trust estate created in good faith by another. It is always a question of fact, shown by the evidence, whether the trust was created in good faith, and

on collateral attack in a bill of review the state court is not privileged to determine what evidence another court heard or did not hear. There was no proof in the bill of review case as to whether Mrs. Huszagh had contributed to the trust in question.

Seven days after the entry of the decree of sale in the creditor's suit and during term time of the court, Dorothea W. Huszagh made and entered into an agreement with Cardwell, in respect to which the Supreme Court of the State of Illinois in its opinion (Rec. 131-132) said:

> "Within seven days after the entry thereof, the attorney for Mrs. Huszagh approached counsel for Cardwell and asked him if his client would bid the full amount of his judgment upon which the creditor's bill was predicated, so that there would be no deficiency unsatisfied against Mrs. Huszagh. After a complete conversation, the attorney for Cardwell agreed that he would, on behalf of his client, satisfy the entire judgment if Mrs. Huszagh would agree not to litigate the case further. The proposition was submitted to Mrs. Huszagh and she approved the same and authorized her attorney to enter into such agreement. Pursuant to such arrangement, Cardwell was the successful bidder at the sale. He paid all of the costs, including the master's fees. He prepared a satisfaction piece which was approved by Mrs. Huszagh's attorney and filed in the cause. Both Mrs. Huszagh and her attorney testified to the facts above related in the bill of review hearing and the said agreement was fully executed. Mrs. Huszagh accepted the benefits of this agreement which was executed more than four months before she filed her petition in bankruptcy. Cardwell cannot now be placed *in statu quo* and we believe that Dorothea W. Huszagh is precluded and estopped from obtaining any relief under her counterclaim or from relitigating any of the questions determined in the creditor's suit. The trial court had full jurisdiction to pass upon all of the questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a

spendthrift trust. Dorothea W. Huszagh is now estopped from litigating those questions again in the bill of review case.

24. It appears clear to this Court that the agreement made between Mrs. Huszagh and Cardwell related to matters in which they were both competent to contract, and resulted in the decrees, entered by the trial court in the creditor's suit, becoming consent decrees."

After the making of this agreement, the Circuit Court by agreement of the parties entered its decree approving the master's report of sale (Rec. 84).

Ten months after the entry of the decrees mentioned, Mrs. Huszagh filed her voluntary petition in bankruptcy (Rec. 17; Rec. 4) and, thereafter, the petitioner filed his bill of review in the Circuit Court of Lake County, seeking to set aside the decree of sale and the decree approving the master's report of sale in the creditor's bill suit, on the ground that such decrees were entered erroneously because Section 49 of Chapter 22 of the Illinois Revised Statutes (Rec. 27-29) provided that an interest in a trust estate created in good faith by someone other than the beneficiary could not be taken and sold by any judicial process for the payment of a debt of the beneficiary (Rec. 28-29; 131).

The trial court dismissed the complaint filed by the petitioner and also the counterclaim for review filed by Mrs. Huszagh for want of equity, holding, as a matter of fact and of law, that by reason of the agreement which Mrs. Huszagh made and entered into with Cardwell the decrees sought to be attacked became consent decrees and that, furthermore, since Mrs. Huszagh for a valuable consideration had agreed not to take any steps to litigate further the subject matter of the creditor's bill suit or the decree of sale, by appeal, bill of review or otherwise; and since Cardwell could not be placed in *statu quo,* Mrs. Huszagh was estopped more than four months prior to the advent

of bankruptcy from attacking said decrees. Since Mrs. Huszagh for more than four months before bankruptcy had been estopped from attacking said decrees, her trustee in bankruptcy did not have any greater rights to attack (on the sole ground of a mistake of law) the decrees, than Mrs. Huszagh had four months prior to bankruptcy. In other words, the event of bankruptcy did not *ipso facto* recreate rights which had been bargained away in good faith and for a valuable consideration more than four months before bankruptcy.

The trial court in the bill of review case (Rec. 66) found that in the creditor's bill suit the court had jurisdiction over the parties and the subject matter of such decree, and the Supreme Court of Illinois in its opinion, confirmed the finding of the trial court, stating:

> "The trial court had full jurisdiction to pass upon all questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a spendthrift trust." (Rec. 132.)

NOTE: Since the petitioner did not attach a copy of the opinion of the Supreme Court to his petition, as is required by the rules of this court, this respondent has attached a copy of such opinion as an appendix to his brief for the convenience of the court.

THE QUESTIONS PRESENTED.

Although a variety of questions might be regarded as incidentally involved in the decision of the Illinois Supreme Court, that decision does not basically involve more than one question of fact in respect to which the testimony in the bill of review case was undisputed, namely, did Mrs. Huszagh and Cardwell within term time make and enter into an agreement whereby, for a valuable consideration, Mrs. Huszagh agreed not to litigate any further the matters involved in the creditor's bill suit, and by reason thereof the decrees in the creditor's bill case became consent decrees and whereby Mrs. Huszagh, more than four

months prior to the advent of bankruptcy, already was estopped from filing any bill of review or otherwise attacking the decrees in question.

As a matter of Illinois law, this respondent contends that the decrees in the creditor's suit were valid and not subject to any collateral attack, independently of the making of the agreement between Cardwell and Mrs. Huszagh; because the validity of the creditor's bill suit on a collateral attack does not depend upon technical correctness of any pleadings in such suit but upon the evidence heard and considered by the trial court in the creditor's suit (*Stoll* v. *Gottlieb,* 305 U. S. 165, 172, 176), which was not preserved and which, if it was preserved, could not be considered on a collateral attack; and because the unknown evidence in the creditor's suit might have indicated that Mrs. Huszagh had contributed to the trust in question and then, under the Illinois authorities, she would not be entitled to the protection of Section 49 of Chapter 22 of the Illinois Revised Statutes. (*Requa* v. *Graham,* 187 Ill. 67.) Furthermore, her failure to plead or interpose the defense of that statute precluded her from attacking the decrees of the trial court upon the ground of the error claimed by her trustee in bankruptcy.

At the time of the entry of the decrees in the creditor's bill suit sought to be attacked collaterally, no question of bankruptcy law was involved. Mrs. Huszagh did not file her petition in bankruptcy until ten months later (Rec. 4; 27-28.) The validity of the decrees attacked collaterally by a bill of review involved solely a question of state law, as that law was at the time of the entry of the decrees attacked.

The construction which the state Supreme Court placed upon Section 49 of Chapter 22 of the Illinois Revised Statutes was a matter of state law decided by a state court ten months before the advent of bankruptcy, and it did not involve the determination of any question of bankrupcy law.

PROPOSITIONS OF LAW.

I.

A bill of review does not lie to set aside a consent decree which relates only to private rights between parties competent to contract, who acted with the advice of their respective attorneys, in case where such decree was entered more than four months before bankruptcy and is attacked solely on the ground that the trial court committed an error of law in entering such decree.

Harding v. *Harding,* 198 U. S. 317, citing 11 Ill. 540.

Bergman v. *Rhodes,* 334 Ill. 137.

Crow v. *Harrison,* 248 Ill. 462.

King v. *King,* 215 Ill. 100, 115, 119 (did not challenge jurisdiction of court below cannot raise the same on appeal).

Armstrong v. *Cooper,* 11 Ill. 540.

Harrigan v. *County of Peoria,* 262 Ill. 36.

II.

In a case where no question of public policy is involved, and the parties are competent to contract, regarding the subject matter of their agreement, a defendant who, for a valuable consideration, has agreed to take no steps to attack the validity of the decree, ceases to have the right to do so, and it can make no difference whether the decree is erroneous or even void for want of jurisdiction, for the defendant is, nevertheless, bound by his agreement not to attack its validity.

Bergman v. *Rhodes,* 334 Ill. 137.

King v. *King,* 215 Ill. 100.

Smucker v. *Larimore,* 21 Ill. 267.

Corwin v. *Shoup,* 76 Ill. 246 (minor accepting proceeds of a void sale on becoming of age is estopped to prosecute writ of error).

Trapp v. *Off*, 194 Ill. 287.
Hudnall v. *Ham*, 183 Ill. 486.
Hempstead v. *Broad*, 282 Ill. 524.
Bonney v. *Lamb*, 210 Ill. 75, 98.

III.

The Supreme Court of the United States of America does not grant the writ of certiorari for the purpose of inquiring into the weight of the evidence and discussing specific facts in a case where the trial court and the Supreme Court of the State of Illinois have concurred in their findings to the effect that the decrees sought to be attacked collaterally were consent decrees.

United States of America v. *Commercial Credit Co.*, 286 U. S. 63, 67.

Luckenbach v. *McCahan Sugar Refining Co.*, 248 U. S. 139.

> "We do not grant a certiorari to review evidence and discuss specific facts."

United States of America v. *Johnston*, 268 U. S. 220, 227.

IV.

Since the protection, if any, afforded the defendant in a creditor's suit by Section 49 of Chapter 22, Illinois Revised Statutes, may be waived by the defendant and is waived if not asserted when opportunity is afforded, there was no error of law committed by the court in entering the decree in the creditor's suit.

Binns v. *La Forge*, 191 Ill. 598 (creditor's suit).
Wright v. *Dunning*, 46 Ill. 271, at 275 (foreclosure).
The People v. *Fisher*, 340 Ill. 250, at 261.
Harrigan v. *County of Peoria*, 262 Ill. 36.
Hunsley v. *Aull*, 387 Ill. 520, at 523.

V.

Section 49 of the Illinois Chancery Act (Chap. 22, Ill. Rev. Stat.) does not protect a trust which ostensibly proceeds from some person other than the defendant, if, in fact, the defendant directly or indirectly contributed any part of the trust fund, either at the time of its creation or subsequently thereto, and it is always a question of fact whether such defendant did contribute, which need not appear merely from the pleadings in the case, and such question of fact cannot be tried de novo by a bill of review.

Re Qua v. *Graham,* 187 Ill. 67.
Linn v. *Dowling,* 216 Ill. 64.
Harrigan v. *County of Peoria,* 262 Ill. 36.

VI.

A decree in a non-bankruptcy court predicated on the validity of a lien arising more than four months before bankruptcy is res adjudicata in a subsequent suit commenced by the trustee in bankruptcy.

Blair v. *Brailey,* 221 Fed. 1, 4. (Cir. Ct. of Appeals, 5th Circuit—cert. denied 238 U. S. 638.)

VII.

The trial court in reviewing its former decree, on hearing a bill of review for alleged error of law apparent on the record, where the former decree recites that testimony was heard, has no jurisdiction to make a ruling on the effect of going to trial in the case under review without a reply on file. The effect of going to trial without a reply on file cannot be determined from an examination of the pleadings alone, but depends upon the proceed-

ings had and evidence heard upon the trial of the case under review, which is outside of the scope of review allowable either by the trial court reviewing its former decree or the Appellate Court or Supreme Court on appeal in such case.

Knaus v. *Chicago Title & Trust Co.*, 265 Ill. 588, 592-3.

Chap. 110, Par. 164 Ill. Practice Act, Bar Association Edition, 1943 (Specifically provides that the penalty of admission does not apply where "the party has had no opportunity to deny").

Rule 8 of the Illinois Supreme Court gives 20 days to answer and such time had not expired.

Piot v. *Davis*, 241 Ill. 434, 439 (Rule where case was heard on pleadings and evidence).

Dempsey v. *Burns*, 281 Ill. 644.

Kelly v. *Kelly*, 285 Ill. 72, 75.

Guerin v. *Guerin*, 270 Ill. 239, 244.

Imperial Fire Insurance Co. v. *Schimmer*, 96 Ill. 580.

VIII.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes "establishes a rule of property and not of procedure only" (Rec. 131).

Potter v. *Couch*, 141 U. S. 296, 312.

Spindle v. *Shreve*, 111 U. S. 542.

Baumgarten v. *Reconstruction Finance Corp.*, 131 F. (2d) 741.

Hummel v. *Cardwell*, 390 Ill. 526 (*the case at bar*).

Dunham v. *Kaufman*, 385 Ill. 79.

Nichols v. *Levy*, 72 U. S. (5 Wall.) 433.

Knight v. *Gregory*, 389 Ill. 554, 561.

Hull v. *Farmers Loan & Trust Co.*, 245 U. S. 312.

Eaton v. *Boston Safe Deposit & Trust Co.*, 240 U. S. 427.

IX.

The interests of the parties in the case at bar are of such a nature that the court of bankruptcy does not have summary jurisdiction and, therefore, the trustee in bankruptcy had his day in court when he filed his plenary suit in the Illinois court.

Cline v. *Kaplan*, 323 U. S. 97.
In re Baudouine, 101 Fed. 574 (2nd Cir. Ct. N. Y. 1900).

X.

Section 70a of the Bankruptcy Act does not define exemptions or property rights. By its express terms no substantive rights or special remedies are created in favor of the trustee in bankruptcy changing the character of the property which, by virtue of the express terms of an Illinois statute (not mere judicial decision regarding the common law), is not available to be taken in payment of a debt by any judicial process.

Hull v. *Farmers L. & T. Co.*, 245 U. S. 312.
Eaton v. *Boston Safe Deposit Co.*, 240 U. S. 427.
Potter v. *Couch*, 141 U. S. 296, 319.
Spindle, Assignee v. *Shreve*, 111 U. S. 542.
Southern Dairies, Inc. v. *Banks*, 92 F. (2d) 282 (certiorari denied 302 U. S. 761).
Steele v. *Buel*, 104 Fed. 968 (Cir. Ct. of App. 8th Circuit 1900).
Holden v. *Stratton*, 198 U. S. 202.
Turner v. *Bovee*, 92 F. (2d) 791, 792.
Lockwood v. *Exchange Bank*, 190 U. S. 294.

SUMMARY OF ARGUMENT.

1. The petitioner by his bill of review sought to attack collaterally, solely on the ground of alleged error of state law, two consent decrees (not subject to be reviewed by a bill of review), which had become *res adjudicata* more than 4 months prior to bankruptcy.

2. Whether the decrees sought to be attacked collaterally were consent decrees was a question of fact, and the finding of the state trial court, confirmed by the state Supreme Court, will not be reviewed by certiorari by this court.

3. Aside from the question of consent decrees, a bona fide agreement made for a valuable consideration respecting a subject matter in regard to which the parties were competent to contract, wherein the parties agreed to settle and compromise their litigation, fully executed more than 4 months prior to bankruptcy, estops both parties to such agreement, and the petitioner claiming through one party, from maintaining his bill of review.

4. A state court decree, which became *res adjudicata* more than 4 months prior to bankruptcy, is not affected by the provisions of Section 70a of the bankruptcy act in case where such decree is sought to be attacked by the petitioner solely on the ground that the court entering the decree committed an alleged error of state law.

5. No question of bankruptcy law was necessarily involved in the decision of the state Supreme Court, which construes the effect of a state statute (Section 49 of Chapter 22 of the Illinois Revised Statutes) making the interest of a beneficiary in a trust created in good faith by another for the support of the beneficiary just as immune from the

claim of creditors as an interest in a so-called typical spendthrift trust.

6. There was no error of law committed by the trial court in entering the decrees sought to be attacked collaterally.

7. No question of any conflict between any Illinois statute and the bankruptcy act, or any question of due process of law, is involved.

8. No question of federal law or any important question of law is here involved.

ARGUMENT.

I.

A. A bill of review does not lie to set aside a consent decree which relates only to private rights between parties competent to contract, who acted with the advice of their respective attorneys in a case where such decree was entered more than four months before bankruptcy and is attacked solely on the ground that the trial court committed an error of law in entering such decree.

B. Consent that the decrees shall stand and be enforced, given by the defendant to the plaintiff for a valuable consideration, within term time, makes the decrees consent decrees, in regard to which under the Illinois law no bill of review will lie.

The petitioner contends that the interest of Dorothea W. Huszagh in the trust estate created by her father's will could be assigned by her and, therefore, her right, if she had any, to attack the consent decrees passed to the petitioner.

Upon the same premise that such interest could be assigned, such interest was a subject matter which both the Illinois trial court (Rec. 66, 98) and the Illinois Supreme Court in its opinion (Rec. 132) properly found was of such a character "that the agreement made between Mrs. Huszagh and Cardwell related to matters in which they were both competent to contract."

Upon the premise that Mrs. Huszagh could have assigned her beneficial interest in the trust estate, Mrs. Huszagh could make a bargain with Cardwell, which she did make, relating to her interest, providing that the decree for the sale of her interest stand and be carried out by a sale at public auction. If at such sale the interest brought

more than the amount due Cardwell on his judgment, the overplus would have been given to Mrs. Huszagh. The fact that at the public sale there was no overplus is immaterial. Cardwell agreed (Rec. 131-132), regardless of what price the interest brought at the master's sale, to satisfy in full his common law judgment entered against Mrs. Huszagh in another case, to pay master's fees, which he did, in the sum of $200.00 and all expenses and costs in the creditor's suit, and agreed to file a satisfaction piece in the common law suit.

In case where the parties are competent to contract respecting the subject matter of their agreement, a defendant who, for a valuable consideration, has agreed to take no steps to attack the validity of the decree, ceases to have the right to do so, and it makes no difference whether the decree is erroneous or even void for want of jurisdiction, because the defendant, nevertheless, is bound by his agreement not to attack its validity. (*Hempstead* v. *Broad,* 275 Ill. 358, 365; *Corwin* v. *Shoup,* 76 Ill. 246; *Bergman* v. *Rhodes,* 334 Ill. 137; *King* v. *King,* 215 Ill. 100.)

Since more than four months elapsed from the time of the entry of the consent decrees sought to be attacked collaterally and the advent of bankruptcy, the decrees sought to be attacked had become *res adjudicata* more than four months prior to bankruptcy. There is no provision in the bankruptcy act which gives the trustee in bankruptcy rights to attack and set aside decrees on the sole ground of a mistake of law which, according to the laws of the State of Illinois, have become *res adjudicata* between the parties more than four months prior to the advent of bankruptcy.

There is no question of fraud involved in this case (Rec. 87). The sole ground upon which the trustee in bankruptcy sought to attack the decrees by his bill of

review was on the ground of mistake of law (Rec. 27; 129), but a consent decree, entered more than four months prior to the advent of bankruptcy, cannot be set aside because of any error of law in entering such decree, either by a party to such decree or by his trustee in bankruptcy. (*Harding* v. *Harding*, 198 U. S. 317, citing *Armstrong* v. *Cooper*, 11 Ill. 540; *Crow* v. *Harrison*, 248 Ill. 462.)

A bill of review does not lie to set aside a consent decree on the ground of an error of law.

Petitioner contends in his petition that the sale held pursuant to the decrees entered in the creditor's bill suit transferred to Cardwell legal title to the beneficial interest of Mrs. Huszagh in the trust estate created by her father's will. The decree of the trial court ordering the sale in the creditor's suit, and the decree of the trial court in that suit approving the sale, the force and effect of the undisputed agreement made between Cardwell and Mrs. Huszagh, and the Master's public sale and assignment were effective for the purpose of transferring to Cardwell the interest of Mrs. Huszagh in the trust estate created by her father's will, because both the bill of review of the trustee in bankruptcy and the counterclaim for review of Mrs. Huszagh were dismissed for want of equity by the decree of the trial court in the bill of review suit, which was affirmed by the judgment of the state Supreme Court.

The transfer of Mrs. Huszagh's interest, however, was fully effectuated through the consent decrees entered ten months before the advent of bankruptcy, and such decrees, by virtue of the agreement between Cardwell and Mrs. Huszagh, were not subject to be set aside by a bill of review after having been entered. However, it appears that the trustee in bankruptcy makes the contention that because "title to Mrs. Huszagh's interest" passed to Cardwell by proceedings had in the creditor's bill suit, there

was a transfer of Mrs. Huszagh's beneficial interest in the trust within the purview of Section 70a(6) of the bankruptcy act relating to "the unlawful taking or detention of or injury to his property." To contend that a valid consent decree entered ten months before bankruptcy is an unlawful taking is a misnomer and begs the question. Such a contention concedes that in the creditor's suit the court had jurisdiction over the parties and the subject matter of its decree, as was found by both the trial court (Rec. 66) and by the state Supreme Court in its opinion (Rec. 132) otherwise there would be no "taking" as the petitioner alleges. The validity of a consent decree was confirmed by the judgment of the state Supreme Court. Its validity depended upon what was the law of the State of Illinois at the time the decrees sought to be attacked were entered and when Mrs. Huszagh made her agreement with Cardwell. At that time there was no bankruptcy, and no question of bankruptcy law was involved. Reviewing such decrees at a later date, more than four months after their entry, does not involve any proper question of bankruptcy law.

The state Supreme Court, construing Section 49 of the Illinois Chancery Act (Chap. 22 of the Illinois Revised Statutes 1945) relied upon by the plaintiff in his bill of review as sole ground for showing that there was an error of law in entering the decree in the creditor's suit, determinined only what was the proper construction of the state statute law at the time the consent decrees were entered. The state Supreme Court, in construing the Illinois statute relied upon, held that upon the facts in the case, as found by the trial court and confirmed by the state Supreme Court, no bill of review would lie. Such a determination of fact and state statute law is not subject to be reviewed by certiorari by this court. Whether such decrees should be set aside by a bill of review was solely a question of state law. If the decrees were subject to be

set aside by a bill of review although they were consent decrees and although Mrs. Huszagh made her agreement with Cardwell, then the Supreme Court would have provided in its judgment that relief be given to either the trustee in bankruptcy on his bill of review or to Mrs. Huszagh, on her counterclaim for review. Its actual decision in the case was that no bill of review would lie at the instance of Mrs. Huszagh or at the instance of the trustee in bankruptcy, and the rationale of the Supreme Court's decision was that the decrees sought to be attacked, being consent decrees, were at no time subject to be set aside by a bill of review on the ground of a mere error of law by Mrs. Huszagh. After the lapse of four months, the trustee in bankruptcy could claim only that the "rights" of Mrs. Huszagh "passed" to him. However, since Mrs. Huszagh had no right to maintain a bill of review, there was no right which "passed" to her trustee in bankruptcy on the advent of bankruptcy, irrespective of the fact whether Mrs. Huszagh's interest would have passed to the trustee in bankruptcy if there had been no creditor's bill proceedings and if there had been no agreement between her and Cardwell. Having decided in the negative the first question as to whether Mrs. Huszagh at any time had a right to maintain a bill of review to set aside a consent decree in the creditor's suit, because of an alleged error at law, the opinion of the Supreme Court of Illinois dealing with the second question, as to whether or not the trustee in bankruptcy would have had a right to maintain a bill of review to set aside the decrees in the creditor's suit if Mrs. Huszagh had not made the agreement she made with Cardwell, was a moot question not necessarily involved in this case and constituted mere dictum. By claiming that Mrs. Huszagh's "right" to maintain a bill of review "passed" to him by virtue of Section 70a(5) or 70a(6) of the bankruptcy act, the petitioner begs the question. He claims that he can set aside consent decrees

because a "right" to set them aside "passed" from a bankrupt by virtue of the bankruptcy act in case where at the advent of bankruptcy and more than four months prior thereto the bankrupt had no right to set aside the consent decrees for alleged error of law. This being the status of the attacked decrees more than four months before bankruptcy, there could not have been an unlawful taking within the meaning of Section 70a(6) of the bankruptcy act by virtue of a decree which was found and adjudicated by the Supreme Court of Illinois, at a time it had jurisdiction over the parties and the subject matter in the bill of review case, to be lawful and not subject to be set aside.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes were enacted as a matter of public policy for the benefit of a beneficiary in a trust estate but have never been construed to hold that in a creditor's bill, with the consent of the beneficiary, such property could not be sold to pay a debt. In the case of *Binns* v. *LaForge,* 191 Ill. 598, the Supreme Court affirmed a decree of the trial court which subjected the interest of a beneficiary in a trust, within the purview of the statute cited, to the payment of a debt, because the beneficiary did not take an appeal. The Illinois Supreme Court would not in the case last cited have affirmed the decree of the trial court if it were of the opinion that the trial court had no jurisdiction to enter the decree it did enter. When the Supreme Court affirms a decree of the trial court, it can no longer be contended that the trial court entering such decree did not have jurisdiction over the parties and the subject matter of its decree.

The trustee in bankruptcy, at various times, and even in his argument in the petition filed in this court, has tried to treat matters in the bill of review case as if he were trying the creditor's bill suit *de novo,* with a right

to interpose defenses on behalf of Mrs. Huszagh or on his own behalf, which were not interposed in the creditor's suit. He has purposely failed to mention in his summary statement of facts or argument the very salient and controlling feature of the state Supreme Court decision to the effect that the decrees sought to be attacked collaterally were consent decrees, and has not enlightened this court as to the controlling fact that Cardwell and Mrs. Huszagh, for a valuable consideration, made and entered into an agreement more than ten months before bankruptcy, wherein Mrs. Huszagh agreed not to litigate further, and, in particular, not to take any appeal or file any bill of review in respect to the decree of sale in the creditor's suit.

Contrary to the rules of this court, the petitioner has adopted the novel and unwarranted expediency of attaching as appendix to his petition, not a copy of the opinion of the Illinois Supreme Court but the second opinion of the Illinois Appellate Court, although his petition herein is not and could not be directed to the judgment of the Appellate Court, reversed, as it was, by the judgment of the Illinois Supreme Court.

II.

Whether the decrees in the creditor's suit sought to be attacked collaterally by a bill of review were consent decrees is a question of fact which will not be reviewed on certiorari by the Supreme Court of the United States.

The Circuit Court of Lake County, Illinois, found and adjudicated (Rec. 66-67) that the decrees sought to be attacked were consent decrees and that, for a valuable consideration, Mrs. Huszagh had agreed with Cardwell that she would not file any bill of review or take any further steps to litigate the validity of the decrees sought to be attacked by the trustee in bankruptcy. The bona fides of

such agreement is not in issue (Rec. 87) but is conceded in this case where the validity of the decrees is sought to be attacked collaterally only on the ground of an error of law (Rec. 27-29; 129). Whether the decrees were consent decrees is a matter of fact, and the finding of the trial court, concurred in by the Supreme Court of Illinois, makes such fact final, because the Supreme Court of the United States does not grant a writ of certiorari for the purpose of inquiring into the weight of the evidence and discussing specific facts. (*Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139.) Furthermore, the evidence in the bill of review case (Rec. 81-89), showing that the decrees were consent decrees is undisputed.

III.

Section 70a of the Bankruptcy Act does not define exemptions or create property rights in derogation of the express terms of the Illinois statute (Section 49 of Chapter 22 of the Illinois Revised Statutes) pertaining to the interest of a beneficiary in a trust estate created in good faith for support of someone other than the beneficiary.

It is the contention of the trustee in bankruptcy that even in the absence of fraud or mistake of fact, he has some special standing and privilege in a plenary bill of review suit in a court of Illinois to attack decrees which became *res adjudicata* more than four months prior to bankruptcy, which the bankrupt would not have if bankruptcy had not intervened. There is no language in Section 70a of the bankruptcy act which could be construed to create such special remedy or discrimination in favor of a trustee in bankruptcy.

The Supreme Court of Illinois was right in holding, as a matter of *obiter dicta* that in a plenary suit a trustee in bankruptcy has no right to take an interest in property which, by virtue of an express statute (Section 49 of

Chapter 22) of the State of Illinois, as construed by not only the Supreme Court of that state but as repeatedly construed by the Supreme Court of the United States, creates a rule of property and renders property of the specific character falling within the purview of the statute immune from claims of all creditors. Property so immune from claims of all creditors would not have passed to the trustee in bankruptcy if there had not been any proceedings in the creditor's bill suit. This holding by the Illinois Supreme Court was not necessary to its decision, which rested solely, as appears from the dismissal of Mrs. Huszagh's counterclaim for review, upon the ground that the decrees were consent decrees entered more than four months prior to bankruptcy.

The dictum of the Supreme Court to the effect that the trustee in bankruptcy had no right to recover and administer as a part of the assets of the bankrupt's estate any portion of the principal or income from the trust estate created by the last will of Mrs. Huszagh's father, was not the basis of its judgment.

However, the dictum of the Illinois Supreme Court was based upon its own construction of Section 49 of Chapter 22 of the Illinois Revised Statutes, which must be regarded as if it were read into every trust made since the passage of that statute in 1845. Such statute gives a particular character to the interest of a beneficiary in a trust estate, that is within the purview of Section 49 of Chapter 22 of the Illinois Revised Statutes, also known as Section 49 of the Illinois Chancery Act, and creates a rule of property. (*Potter* v. *Couch*, 141 U. S. 296, 312.) Such interest is as immune from the beneficiary's debts as is an interest in a typical spendthrift trust.

In the case of *Steib* v. *Whitehead*, 111 Ill. 247, where the interest of a beneficiary in a typical spendthrift trust was involved, the Supreme Court of Illinois held that funds

in the hands of the trustee could not be attached by creditors.

In the case of *Knight* v. *Gregory,* 389 Ill. 554, at page 561 of its opinion, the Illinois Supreme Court stated:

> "In view of section 49 of the Chancery Act, however, all active trusts, which otherwise qualify, come under the doctrine of *Steib* v. *Whitehead,* 111 Ill. 247. With these authorities and others of a similar nature cited by appellants we agree. These authorities are, however, concerned only with an interpretation of the rights of creditors seeking redress against funds in the hands of a trustee under either a spendthrift trust or an active trust qualifying under Section 49 of the Chancery Act."

In *Potter* v. *Couch,* 141 U. S. 296, at page 320 of its opinion, the Supreme Court of the United States in speaking of the Illinois statute stated:

> "the spirit of the statute alike require that this equitable interest should not be charged for his debts."

and that the Illinois statute

> "establishes a rule of property, and not of procedure only."

In *Eaton, Trustee in Bankruptcy* v. *Boston Safe Deposit and Trust Company,* 240 U. S. 427, the court had under consideration a trust established by a will, in which will it was provided that the income shall be free from interference of creditors. In Illinois, Section 49 of Chapter 22 of the Illinois Revised Statutes, had been in force and effect in its present form since the year 1845, and it has repeatedly been construed as creating a rule of property. Every will creating a trust, bona fidely created by one person for the benefit of another, must be read to the same extent and in like manner as if specific reference to the statute mentioned had been made in the will. With this fact in mind, the case at bar, as far as the contentions of the

petitioner are concerned, is similar to the case of *Eaton, Trustee in Bankruptcy* v. *Boston Safe Deposit and Trust Company,* 240 U. S. 427, in which the Supreme Court stated in its opinion:

> "The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it."

Since the petitioner contends that he was entitled to maintain his bill of review only because of the force and effect of Section 49 of Chapter 22 of the Illinois Revised Statutes, he must be bound by the construction placed on that statute by the Supreme Court of Illinois. The United States Supreme Court will follow the decisions of the Illinois Supreme Court construing an Illinois statute. In the case of *Page* v. *Edmunds,* 187 U. S. 596, at page 602, the United States Supreme Court stated:

> "If those decisions are interpretations of the state statute, we must yield to their authority."

No question of any conflict between any Illinois statute and the bankruptcy act, or any question of due process of law, is involved. No question of federal law or any important question of law is here involved.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this is not a proper case for review by certiorari and that the petition for such writ should be denied.

Respectfully submitted,

DWIGHT S. BOBB,
Attorney for the Respondent,
James R. Cardwell.

OSCAR S. SEAVER,
Of Counsel.

APPENDIX.

OPINION OF THE SUPREME COURT.

Appeals from the Appellate Court for the Second District;—heard in that court on appeal from the circuit court of Lake county; the Hon. Ralph J. Dady, Judge, presiding.

Edward G. Berglund, of Chicago, for appellant Dorothea W. Huszagh; Oscar S. Seaver, of Chicago, for appellant James R. Cardwell; Barre Blumenthal, of Chicago for appellant Fred J. Wegg, trustee; Sidney H. Block, of Waukegan, for appellee.

MR. CHIEF JUSTICE FULTON DELIVERED THE OPINION OF THE COURT:

On November 15, 1940, Fred E. Hummel, as trustee in bankruptcy of the estate of Dorothea W. Huszagh, filed his bill of review in the circuit court of Lake county, seeking to vacate and set aside two decrees entered in that court, namely, a decree of sale entered November 17, 1939, and a decree approving the master's report of sale entered on December 15, 1939, both in a creditor's suit commenced by James R. Cardwell against Dorothea W. Huszagh and Fred J. Wegg, trustee. The defendants to the complaint were James R. Cardwell, Dorothea W. Huszagh and Fred J. Wegg, as the sole trustee under the will of Frederick H. Wickett, deceased. All of the defendants filed answers and Dorothea W. Huszagh filed a counterclaim.

On a hearing in the circuit court, the chancellor dismissed both the complaint and the counterclaim as being

without equity. From this decree Hummel appealed to the Appellate Court for the Second District and all of the defendants filed cross appeals, resulting in a variety of contentions, all earnestly urged by the different parties to the suit.

The Appellate Court reversed the action of the trial court in dismissing, for want of equity, the bill of review filed by the trustee in bankruptcy, and affirmed that portion of the decree of the circuit court which dismissed, for want of equity, the counterclaim for review filed by Dorothea W. Huszagh. It further remanded the cause to the Lake county circuit court with directions to vacate and set aside its decree of sale entered November 17, 1939, and also the decree of December 15, 1939, approving the report of sale, and to restore Dorothea W. Huszagh to her former status and condition under her father's will as though the former decrees had not been rendered. Separate petitions for leave to appeal were filed by the defendants and allowed, and, by order of court, the appeals have been consolidated. All of the above-named defendants to the bill of review appear as appellants in this court.

The will of Frederick H. Wickett, after providing for the payment of his debts, and making minor specific bequests, devised and bequeathed to Fred J. Wegg (and Norman M. Hancock, who refused to act,) his entire estate, in trust, for the uses and purposes set forth in the will. Fred J. Wegg qualified and assumed the trust imposed in him by said will, and, as such trustee, he was given full power to manage and control all of the residuary estate. The title to said estate vested in said trustee with ample authority and discretion to sell and dispose of the property as he deemed best, the proceeds of such sales, however, to become a part of the trust estate and subject to the terms of the trust. The tenth clause of the will directed the trustees to pay, out of the trust estate, the sum of $1500

per month to the wife, Alice W. Wickett, during her lifetime, and such other sums as she might, in the judgment of the trustees, deem fit for her needs and requirements. Alice W. Wickett, the widow of the testator, renounced the provisions of the will for her benefit.

The eleventh clause of the will reads as follows: "Upon the death of my said wife, my said trustees are directed to pay the net annual income of my said trust estate, in such installments as in their judgment shall seem best, equally to my children, Dorothy Huszagh and Marjorie Huszagh, share and share alike. My said trustees are, however, expressly authorized and empowered to pay over and deliver to my said children, Dorothy Huszagh and Marjorie Huszagh, from time to time, as in their judgment shall seem fit, such further or other portion of the corpus of this trust estate; Provided, however, that at all times both my said children shall be treated equally, so far as the division of said trust estate is concerned."

By the thirteenth clause of the will, the trust period was to continue for twenty years after the death of his wife.

The fifteenth clause of the will is as follows: "I hereby expressly authorize and empower my trustees from time to time to pay any part of the corpus of this trust estate to any of my relatives if, in the opinion of my said trustees, they may be in want or need of assistance."

By reason of the renunciation on the part of the widow, the legal title and possession of that part of the estate relinquished by her, with other residuary assets of the estate, passed to the trustee, Wegg, as part of the trust estate. *Dunshee* v. *Dunshee,* 251 Ill. 405; *Sueske* v. *Schofield,* 376 Ill. 431.

In October, 1939, the appellant James R. Cardwell, having obtained, on August 3, 1939, a judgment against

Dorothea W. Huszagh, filed a complaint in the nature of a creditor's bill in the circuit court of Lake county against Mrs. Huszagh and Wegg, as trustee, and sought to reach the interest which Mrs. Huszagh had in the trust created by the will of her father. Both Wegg, as trustee, and Dorothea W. Huszagh filed answers denying that the interest of the latter in said trust was subject to sale for the benefit of the creditor, and maintaining that the trust was in the nature of a spendthrift trust. On a hearing in the creditor's suit, the circuit court of Lake county held that the interest of Dorothea W. Huszagh in the said trust estate constituted personal property of an equitable nature and did not create a trust in the nature of a spendthrift trust and that such interest was subject to equitable attachment and sale in that proceeding for the purpose of satisfying, in whole or in part, the unpaid judgment in favor of Cardwell. A decree of sale in said cause was entered On November 17, 1939, and a sale was held by the master in chancery at which Cardwell became the purchaser of the interest of Dorothea W. Huszagh. The sale was approved and confirmed in the circuit court by decree dated December 15, 1939.

Dorothea Huszagh had also been a defendant in a foreclosure proceeding in the city of Chicago, where a decree of sale was entered on June 30, 1939. Pursuant to this decree, a sale was made resulting in a deficiency decree against Dorothea Huszagh in the sum of $533,394.13. On August 20, 1940, she filed voluntary bankruptcy proceedings, and the appellee herein was appointed trustee in bankruptcy on October 24, 1940. On November 15 thereafter, he filed his complaint for review.

In his complaint the trustee in bankruptcy contends that the circuit court did not have jurisdiction to enter the decree of sale in the creditor's suit disposing of the interest of Dorothea W. Huszagh in the trust because it

is governed by section 49 of the Chancery Act. (Ill. Rev. Stat. 1943, chap. 22, par. 49.) The provision reads as follows: "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a complaint against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not; * * *."

The claim of Cardwell, as the judgment creditor and as the purchaser of Dorothea W. Huszagh's interest in the trust at the sale, necessarily rests upon the validity of the decree entered November 17, 1939. He insists that the circuit court had jurisdiction of the parties and of the subject matter of the trust; that, on the hearing, testimony was taken in open court; that the court determined the trust was not a spendthrift trust, and that no appeal was taken from that decree; also, that within seven days after the decree of sale was entered, Dorothea W. Huszagh, for a valuable consideration, agreed she would not take any action by way of appeal or review or question

the decrees taken in the creditor's suit. He appeals from the action of the Appellate Court wherein it reversed the decree of the trial court in dismissing the bill of review for want of equity.

Dorothea W. Huszagh maintains that the trust created in her father's will is a spendthrift trust; seeks to reverse the judgment of the Appellate Court and insists that the portion of the decree of the trial court dismissing Hummel's bill of review for want of equity should be affirmed; also that the portion of said decree in the trial court dismissing her counterclaim for review should be reversed with direction to grant the prayer contained in the said counterclaim.

Fred J. Wegg, the trustee under the will, asks that the accounting between himself and Dorothea W. Huszagh, as determined by the decree of the circuit court of Lake county in the creditor's suit, under date of November 17, 1939, be confirmed.

Fred E. Hummel, the trustee in bankruptcy and appellee in this court, urges that the judgment of the Appellate Court be affirmed, with directions to the trial court for the entry of a decree and the terms thereof.

With the great diversity of contentions made by the various interests in this cause, it will be difficult to discuss in detail each and all of the questions raised in the briefs.

At the outset, we are confronted with the problem of whether or not the trustee in bankruptcy has such an interest in Mrs. Huszagh's interest in the trust estate as entitles him to maintain his bill of review in this cause.

As above expressed, it is his contention that the order or decree of sale entered by the circuit court of Lake county in the creditor's suit on November 17, 1939, was void because beyond the jurisdiction of the court. His bill of review is based upon the theory that there was

"error apparent" upon the face of the record in that case. Specifically, he maintains that the court had no power to order a sale of Dorothea W. Huszagh's interest in the trust estate because it was in contravention of the exception contained in section 49 of the Chancery Act above quoted.

The record in the case indicates that the creditor's suit in the trial court was determined on the question of whether or not the will of Frederick H. Wickett created a spendthrift trust with Dorothea W. Huszagh as a beneficiary. The chancellor found that her interest in the trust was not in the nature of a spendthrift trust, but there was no express finding as to whether her interest was protected by said section 49. We agree with the statement of the trustee in bankruptcy that the interest of Dorothea W. Huszagh in the trust was not an estate on which a judgment at law would be a lien. We do not believe such interest could be reached by a creditor's bill or that, through a creditor's bill, a creditor could acquire any lien. The trust created in the will may well be described as an active trust and comes squarely under the provisions of the exception in said section 49. The legal title to the assets of said trust became vested in Fred J. Wegg, as trustee under the will. The funds in the trust came directly from the estate of Frederick H. Wickett, and, so far as the record discloses, it was created in good faith and expressly for the purpose of protecting the income. *Potter* v. *Couch,* 141 U. S. 296.

We agree further with the statement of appellee that one of the essentials of a valid judgment is that the court have jurisdiction to render that particular judgment. (*Armstrong* v. *Obucino,* 300 Ill. 140; *People ex rel. Carlstrom* v. *Shurtleff,* 355 Ill. 210; *Thayer* v. *Village of Downers Grove,* 369 Ill. 334.) However, we cannot see that the trustee in bankruptcy is in any better position to

reach Mrs. Huszagh's interest in the trust than was Cardwell, the plaintiff in the creditor's suit. The office of trustee in bankruptcy is created by the Bankruptcy Act, and his powers and the remedies he is authorized to pursue in a plenary suit are defined in such act. The appellee relies upon subsection 5 of section 70A of the Bankruptcy Act for his power and authority to reach the trust estate in this action. The said clause vests the trustee, by operation of law, with the title of the bankrupt, except insofar as it is to property which is held to be exempt, to "property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered." Under this section, we believe the rights of the trustee in bankruptcy relate only to property which passes to him without the necessity of bringing a plenary suit to recover. It refers to property which was in the possession or control of the bankrupt at the date of the bankruptcy. In section 70C of the same act, with reference to all other property, the trustee in bankruptcy is vested with all the rights, remedies and powers of a judgment creditor, and no more.

If the protection of section 49 of the Chancery Act makes the interest of Dorothea W. Huszagh in the trust immune from any suit or lien by a creditor, surely a trustee in bankruptcy representing a creditor can have no greater or superior right. In the matter of exemptions and the interpretations of property rights, the bankruptcy courts have always regarded decisions of the State courts as controlling. (*Erie* v. *Tompkins,* 304 U. S. 64.) In *Johnston* v. *Herrin,* 383 Ill. 598, we held that a contingent interest of a bankrupt is not property which the trustee in bankruptcy can recover in a plenary suit.

The trustee in bankruptcy contends that the amendment to the Bankruptcy Act in 1938 shows that property,

even though it may not be subject to seizure, may pass to the trustee if it is transferable. With the exception given to exempt property in section 70A of the act and the power to acquire property through a plenary suit limited to those of a judgment creditor in section 70C, we do not construe the act to give a trustee in bankruptcy in plenary suits greater remedies in a State suit than those afforded a judgment creditor. Any other rule would be contrary to the plain language of section 70C and permit a trustee to take property which, under the laws of Illinois, could not be taken by any other plaintiff for the payment of a debt. In *Dunham* v. *Kauffman*, 385 Ill. 79, we held that the interest of a beneficiary in a trust could not be reached by attachment. In *Baumgarden* v. *Reconstruction Finance Corp.*, 131 Fed. 2d 741, the Circuit Court of Appeals held that a trust fund which came squarely under the exception in section 49 of the Chancery Act could not be reached by garnishment. It is clear, from the holdings of this court and that of other jurisdictions, that section 49 of the Chancery Act creates a rule of property and does not relate solely to procedure. (*Potter* v. *Couch*, 141 U. S. 296.) The Appellate Court erred in holding that the trustee in bankruptcy had a right to challenge the validity of the sale of the truste estate. The trial court correctly ruled that the bill of review filed by the trustee in bankruptcy should be dismissed for want of equity.

Neither do we believe that Dorothea W. Huszagh is entitled to maintain her present counterclaim or to obtain any relief thereunder. The trial court was in error when it entered the decree of sale on November 17, 1939, in the creditor's suit ordering the interest of Mrs. Huszagh in the trust estate to be sold to satisfy the Cardwell judgment upon which the creditor's suit was based. However, that decree recited that, on the testimony taken in open court and the argument of counsel for the respective parties, it had jurisdiction over all parties in the cause and

the subject matter of the decree. The circuit court of Lake county, sitting as a court of equity, had full power to pass upon all questions arising on the pleadings in the creditor's suit. No action by way of review or appeal was taken from that decree and the testimony was not preserved. Within seven days after the entry thereof, the attorney for Mrs. Huszagh approached counsel for Cardwell and asked him if his client would bid the full amount of his judgment upon which the creditor's bill was predicated, so that there would be no deficiency unsatisfied against Mrs. Huszagh. After a complete conversation, the attorney for Cardwell agreed that he would, on behalf of his client, satisfy the entire judgment if Mrs. Huszagh would agree not to litigate the case further. The proposition was submitted to Mrs. Huszagh and she approved the same and authorized her attorney to enter into such agreement. Pursuant to such arrangement, Cardwell was the successful bidder at the sale. He paid all of the costs, including the master's fees. He prepared a satisfaction piece which was approved by Mrs. Huszagh's attorney and filed in the cause. Both Mrs. Huszagh and her attorney testified to the facts above related in the bill of review hearing and the said agreement was fully executed. Mrs. Huszagh accepted the benefits of this agreement which was executed more than four months before she filed her petition in bankruptcy. Cardwell cannot now be placed *in statu quo* and we believe that Dorothea W. Huszagh is precluded and estopped from obtaining any relief under her counterclaim or from relitigating any of the questions determined in the creditor's suit. The trial court had full jurisdiction to pass upon all of the questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a spendthrift trust. Dorothea W. Huszagh is now estopped from litigating those questions again in the bill of review case.

It appears clear to this court that the agreement made between Mrs. Huszagh and Cardwell related to matters in which they were both competent to contract, and resulted in the decrees, entered by the trial court in the creditor's suit, becoming consent decrees. (*King* v. *King*, 215 Ill. 100; *Bergman* v. *Rhodes*, 334 Ill. 137.) Both the trial court and the Appellate Court correctly held that the counterclaim of Dorothea Huszagh should be dismissed.

Because of the view we take of the questions above discussed, it is not necessary to pass further upon the appeal of Fred J. Wegg, trustee. That part of the judgment of the Appellate Court affirming the decree dismissing the counterclaim of Dorothea W. Huszagh is affirmed. The part of the judgment reversing the trial court's decree dismissing the bill of review is reversed.

Appellate Court affirmed in part and reversed in part; circuit court affirmed.

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Summary of Argument.

The Illinois Supreme Court passed on a question of fact as to whether or not the transaction between Dorothea W. Huszagh and Cardwell constituted a valid agreement, and decided that it did. Such agreement having been executed more than four months prior to bankruptcy, no federal question is involved.

The availability of bankrupt's trust income to his Trustee in Bankruptcy is determined by the law of the situs of the trust. The interpretation of property rights rests in the decision of the State courts and those decisions are controlling.

Where the decisions of a State court might have been either on a State ground or a Federal ground and the State ground is sufficient to sustain the judgment, the Supreme Court will not grant review even if the Federal law is erroneously interpreted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1945

No. 825

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF DOROTHEA W. HUSZAGH,

Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH AND FRED J. WEGG, AS THE SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED,

Respondents.

BRIEF OF FRED J. WEGG, AS SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED, ONE OF THE RESPONDENTS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION BELOW.

The opinion below is reported in 390 Illinois Supreme Court Reports at Page 526. No opinion of the Illinois Supreme Court is attached to the petition. The substitution of the Appellate Court opinion, as an appendix to the petition is improper.

STATEMENT MAKING AGAINST JURISDICTION.

The case at bar was decided by the Illinois Supreme Court on a mixed question of fact and law, as to which it determined that the decree entered in the creditor's bill proceeding was in fact and in law a consent decree; the same having been fully implemented by the parties thereto, the matter was *res adjudicata* more than four months prior to bankruptcy and under the Illinois law no party thereto can have said decree vacated or set aside.

Such proceedings having been concluded, and the interest of Dorothea Huszagh conveyed by the consent decree and the Master's sale and assignment more than four months prior to the intervention of bankruptcy, and no claim of fraud or concealment being charged, the Trustee in Bankruptcy cannot be heard with respect to such transfer.

No federal question of law was necessarily involved in the hearing and determination of that issue.

No substantial or important question of law is presented by this record.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This respondent adds the following to correct and complete the petitioner's "Summary and Short Statement of the Matter Involved."

(a) The decree in the original creditor's bill (Rec. 17-23) proceeding adjudicated the rights of this respondent, Fred J. Wegg, as Trustee under the Will of Frederick H. Wickett, Deceased, and Dorothea Huszagh, one of the beneficiaries under said trust, with respect to important matters of accounting between them;

(b) Said decree found that Dorothea Huszagh was indebted to Wegg, Trustee, in the sum of approximately fifty thousand dollars ($50,000.00) as security for which he had the right to withhold distribution of income from said trust which might otherwise be due the said Dorothea Huszagh;

(c) Said decree was *res adjudicata* as to all parties thereto for more than four months prior to intervention of bankruptcy;

(d) Said petitioner, in his bill of review, recognized that rights in said property interest of Dorothea Huszagh may have attached by reason of the sale pursuant to the decree in the creditor's bill proceeding because he prayed, in the alternative (Rec. 31), for a money judgment against Cardwell in the event that Cardwell had conveyed or assigned interest acquired by him under said decree;

(e) Said petitioner alleged no facts entitling him to set aside the accounting between Dorothea Huszagh and Wegg, as trustee, had in said creditor's bill decree, and in no way attacked said accounting;

(f) Dorothea Huszagh in her counterclaim for review did not attack the accounting between her and Wegg, trustee, stated in said creditor's bill decree, and said accounting was *res adjudicata* between all of the parties to the creditor's suit, including Cardwell, more than ten months prior to bankruptcy.

(g) The Illinois Supreme Court (Rec. 154) held that it was not necessary for it to pass on the appeal of Wegg, trustee, from the Appellate Court regarding the accounting, because it ordered the decree of the trial court in the bill of review case affirmed.

(h) No question of fraud or collusion in connection with said creditor's bill proceeding was raised by the peti-

tioner. To the contrary, he denied in open court (Rec. 87) that any such question was presented;

(i) On the trial of the bill of review case the trial court heard evidence and found (Rec. 67) that Dorothea Huszagh, for a good and valuable consideration paid to her by Cardwell, agreed that she would not take any further action concerning the decree entered in the creditor's bill proceeding;

(j) The Supreme Court found (Rec. 153) as a *matter of fact* that there was such a valid agreement between Dorothea Huszagh and Cardwell; that Cardwell could not be placed in *status quo* and, therefore, Dorothea Huszagh is now estopped from litigating the questions involved in the bill of review case;

(k) Contrary to petitioner's statement, the Appellate Court did *not* sustain the title of the trustee under the Bankruptcy Act. In fact, it expressly refused to pass on this question. (Rec. 121.)

THE QUESTION PRESENTED.

The basic question presented to the Supreme Court of Illinois was whether or not Dorothea Huszagh could relitigate the effect of a decree as to which she had contracted away her rights for a valid consideration, and as to this, the Illinois Supreme Court determined that she was estopped. This matter having transpired more than four months prior to the filing of bankruptcy by her and there being no claim of fraud, the case left no federal question for determination.

PROPOSITIONS OF LAW.

If property is not in Bankruptcy Court's possession and a third person asserts a bona fide claim adverse to the Trustee in Bankruptcy, his rights must be determined in a plenary action.

Cline v. *Kaplan,* 323 U. S. 97.

In re Baudouine, 101 Fed. 574 (2nd Cir. Ct. N. Y. 1900).

In such plenary action the interpretation of property rights (particularly when based upon the express terms of a State Statute) rests in the decisions of the State Courts and those decisions are controlling.

Erie v. *Thompson,* 304 U. S. page 64.

Potter v. *Couch,* 141 U. S. 296.

Where the decision of a State Court might have been either on a State ground or a Federal ground, and the State ground is sufficient to sustain the judgment, the Supreme Court will not grant review, even if the Federal law is erroneously interpreted.

Williams v. *Kaiser,* 323 U. S. 471; 65 S. Ct. 363 (367).

Radio Station WOW v. *Johnson;* 65 S. Ct. 1475, 1480; 89 Law Ed. Sup. Ct. Rep. 1397, 1402; 324 U. S. (Number 3 June 18, 1945 page III).

The Illinois Supreme Court passed on the question of fact as to whether or not the transaction between Dorothea Huszagh and Cardwell constituted a valid agreement, and gave effect to the same according to the laws of Illinois. Such agreement having been executed more than four months prior to bankruptcy and there being no claim of fraud, no Federal question is involved.

Blair v. *Brailey,* 221 Fed. 1 (Cir. Ct. 5th Cir. certiorari denied 238 U. S. 638).

The availability of bankrupt's trust income to his Trustee in Bankruptcy is to be determined by the law of the situs of the trust, and the Trustee must bring a plenary action authorized by state law against the party holding an adverse interest, which is the Trustee under the will.

Lockwood v. *Exchange Bank,* 190 U. S. 294.

ARGUMENT.

The petitioner proceeds on the premise that the interest of Dorothea Huszagh under the trust created by her father's will had not been changed or altered by any conduct of her own; as though there had been no intervention of the Cardwell proceeding, and her agreement with Cardwell concerning the transfer of her interest by her consent to the implementation of the decree of the Lake County Circuit Court.

Even assuming that there had been no intervention of creditor's bill litigation or voluntary agreements based on valid considerations, we submit that the federal courts would follow the decisions of the Illinois Supreme Court concerning the "property rights" which the Trustee in Bankruptcy might have in her interest in said trust.

The "property" sought to be reached by the Trustee in Bankruptcy was neither in the actual or constructive possession of the bankrupt nor in the actual or constructive possession of the Bankruptcy Court. *Blair* v. *Brailey*, 221 Fed. 1 (Cert. denied 238 U. S. 638). To bring this property into the Bankruptcy Court, where it could adjudicate the same under the Bankruptcy Act, it would have been necessary to institute litigation.

That litigation would have required the Trustee to go into a state court in a plenary action. (*Cline* v. *Kaplan*, 323 U. S. 97.) When he arrives in the state court he comes there endowed only with the specific rights and powers granted him by the state law and the Bankruptcy Act. Upon his arrival in a plenary action, he would have been faced with the obstacle set up by Section 49, Chapter

22 of the Illinois Revised Statutes, and the decisions of the State courts construing that Statute have consistently been upheld by the decisions of the United States Supreme Court. (*Potter* v. *Couch,* 141 U. S. 296; *Spindle* v. *Shreve,* 111 U. S. 542.) It has not even been a question of conflicting views, the Supreme Court of the United States properly giving effect to the decisions of the courts of last review of the State which is the situs of the property concerning the rights, limitations and immunities of such property.

It is specious for the petitioner to beg the question he seeks to argue, (his petition, page 19) that if the Illinois court's rule as to property not in the bankrupt's possession, and for which a plenary suit must be brought, is correct, then Section 70-C of the Bankruptcy Act imposes on the Trustee the duty to bring an action which could never succeed. Here the Court is presented with a *particular* type of case in which he cannot succeed, and it is only as to this specific situation that the Court is called upon to consider whether he can succeed and not whether any Trustee in any different case ever can succeed in plenary action.

It will not be contended that the United States Supreme Court will take jurisdiction of a cause to sit in judgment upon the correctness of decisions of the Supreme Court of Illinois with respect to property rights which had been conveyed or disposed of, either by voluntary action or by processes of law more than four months prior to the intervention of bankruptcy, and where, as in this case, no question of fraud is involved.

There has been no contrariety of opinion either by State or Federal decisions on the question of the limitations of Section 49 of our Chancery Act establishing a rule of property, and in these circumstances it is not to be presumed that what the legislature had established as a

rule of property creating immunities of trust interests of this nature when attacked by an individual creditor in his own right, would or should be waived or surrendered, and the immunity destroyed simply because the attack is made by a Trustee in Bankruptcy. The limitation and the protection of the statute is attached to the property and not to the nature or character of the particular plaintiff who seeks to reach that property in satisfaction of debt. Every basis of public policy, responsible in the first instance, for the enactment of this legislation must be considered as granting the property interest itself an immunity; and it must follow as a natural corollary that the matter of who may be the plaintiff in a given situation should be of no consequence. The Trustee in Bankruptcy is just as much subject to the public policy of the State of Illinois as an individual creditor. *Lockwood* v. *Exchange Bank*, 190 U. S. 294. To seek to make a federal question out of a matter which is peculiarly within the rights of a State, simply because the person raising the question is an officer under the Federal Bankruptcy Act, is to ask this Court to intervene in a sphere it has consistently refused to invade.

Petitioner seeks to convey the impression that the Illinois Supreme Court has gone counter to its previous decisions in similar cases and cites Illinois cases (petition, page 13) to an effect contrary to that given in this case—and complains that the Court ignored its previous decisions and thus attempts to establish that our Illinois courts are now dubious about the questions involved. The Supreme Court of Illinois properly ignored the cases cited by the petitioner because those cases had no applicability to the situation at hand. Heretofore, counsel for the petitioner vigorously urged them in his own briefs before that Court. In none of those cases was the Chancery Act involved or even raised; in one of the cases there was no trust; in the second, the trust had terminated; and in the third, the beneficiary of the trust brought his interest into the

Bankruptcy Court by scheduling the same in his own schedules.

The petition for certiorari attempts to induce the impression that in the State courts the only question raised concerned the title of the Trustee in Bankruptcy, and therefor it decided a Federal question. Quite to the contrary, the principal question raised was whether or not the creditor's bill proceedings was *res adjudicata;* whether or not, by reason of the contract between Cardwell and Dorothea Huszagh, the latter was estopped from raising the issue. All this having transpired more than four months before the intervention of bankruptcy, it was necessary for the court to make a decision on this issue *before* the court would have any occasion to consider any rights of the Trustee in Bankruptcy. For it must be obvious that if the Court decided the former questions it would have no occasion to even consider the latter question.

And this is precisely what the trial court, as well as the Illinois Supreme Court, did do. The memorandum opinion of the trial Court on the possible title of the Trustee was rendered on motions to strike and before the trial Court had heard any evidence; the final decree, (Rec. 66-67) from which review was sought, having decided that the previous matter was *res adjudicata,* was binding on Cardwell, Dorothea Huszagh and this respondent and found it unnecessary (and properly so) to pass on the latter question. For that reason, also, we respectfully submit, the Illinois Supreme Court, in affirming the Circuit Court on that question, did all that was necessary to finally conclude the litigation. Its discussion of the rights of the Trustee in Bankruptcy was merely dicta. It also may be noted that the final opinion rendered by the trial court in the bill of review case (Rec. 98) and the only notice of appeal filed by the trustee in bankruptcy (Rec. 68-69) showed that no question of bankruptcy law was decided by the

trial court in entering its decree (Rec. 66-67) dismissing for want of equity the trustee in bankruptcy's bill of review. The judgment of the Illinois Supreme Court affirming the decree of the trial court was not predicated on a broader basis than the decree of the trial court.

The Supreme Court will not review a decision of a state court until it affirmatively appears that a federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Supreme Court will not undertake to review it. *Williams* v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 363 (367). And this is so even if the State Court has erroneously interpreted the Federal law. *Radio Station WOW* v. *Johnson*, 324 U. S. (No. 3 Opinion June 18, 1945) 65 S. Ct. 1475 (1480). *Herb* v. *Pitcairn*, 324 U. S. 117, 65 S. Ct. 459 (463).

The United States Supreme Court does not grant the writ of certiorari upon the mere ground that a part of the reasoning of the opinion of the lower court is doubtful although the result is correct. *Tyrrell* v. *District of Columbia*, 243 U. S. 1.

Petitioner seeks to make much of the fact that Dorothea Huszagh's interest was assignable by her and, therefore, it passed to her Trustee in Bankruptcy. The manifest inapplicability of the conclusion to the premise can be demonstrated as follows:

(a) Dorothea Huszagh, for a good and valuable consideration, and more than four months prior to the intervention of bankruptcy, sold her interest to a stranger. Obviously in such circumstances petitioner will not claim that the Trustee in Bankruptcy would have any right to this interest; or

(b) Dorothea Huszagh lost her interest in the trust by a judicial proceeding more than four months prior to the intervention of bankruptcy. Obviously in this situation also her Trustee in Bankruptcy would have no interest; and

(c) Dorothea Huszagh is estopped by reason of a contract based on a valid consideration from seeking to rescind the loss of her interest, and the matter is *res adjudicata* as to her, and had been for more than four months prior to the intervention of bankruptcy. The Illinois Supreme Court has so ruled in a situation in which it must be admitted that the *lex situs* applies. It must be equally obvious that the Trustee in Bankruptcy cannot claim that a federal question is involved simply because he is a Trustee in Bankruptcy.

To Recapitulate:

1. Ten months prior to the intervention of bankruptcy Dorothea Huszagh became divested of her interest in the trust under the will of her father, and this respondent became bound by findings in the decree concerning matters of accounting;

2. The Illinois Supreme Court has held on a mixed question of law and fact that all matters in said action became and were *res adjudicata* more than four months prior to the intervention of the bankruptcy;

3. To ask this Honorable Court to take jurisdiction on the ground that a federal question is involved *merely* through the intervention of bankruptcy more than four months after the transpiration of events, is to ask this Court to exercise a right of review over judicial proceedings and contractual relationships, the determination of which is solely within the purview of the laws of the situs and the State courts having jurisdiction thereof;

4. Every consideration of the facts and the law which warranted the Illinois Supreme Court in finding that Dorothea Huszagh is estopped from having the Cardwell decree vacated (as to which question it will not be denied that the Illinois Supreme Court decision will be respected) must by the same token be definitive of the rights of the Trustee in Bankruptcy where more than four months had elapsed before the filing of the bankruptcy proceedings. This Court will not grant certiorari to review evidence with respect to which the Illinois Supreme Court has made specific findings.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this is not a proper case for review by certiorari and that the petition for such writ should be denied.

Respectfully submitted,

M. MANNING MARCUS,
Attorney for Fred J. Wegg, as the sole Trustee under the last Will and Testament of Frederick H. Wickett, deceased, one of the Respondents.

BARBE BLUMENTHAL,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1945

No. 825

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF DOROTHEA W. HUSZAGH,

Petitioner,

vs.

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Respondents.

BRIEF OF DOROTHEA W. HUSZAGH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

MAURICE P. GOLDEN,
100 West Monroe Street,
Chicago, Illinois,
Attorney for the Respondent,
Dorothea W. Huszagh.

EDWARD G. BERGLUND,
Of Counsel,
1 North LaSalle Street,
Chicago, Illinois.

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OPINION BELOW.

The opinion below is reported in 390 Illinois Supreme Court Reports at page 526 (advance sheets, 390 Ill. No. 6).

STATEMENT MAKING AGAINST JURISDICTION.

The petitioner improperly substituted a copy of the second opinion of the Illinois Appellate Court in place of

the opinion of the Illinois Supreme Court required by the rules of this court as a part of his petition.

No federal question of law was involved in the matter of the determination by the state trial court and state Supreme Court that consent decrees entered in a creditor's suit, sought to be attacked collaterally, and solely on the ground of a mistake of state law, were, as a matter of state law, *res adjudicata*, more than four months before the filing of a petition in bankruptcy.

The petitioner filed three petitions for certiorari as cases numbered 823, 824 and 825, but he served only one single printed copy bearing all of said numbers on such single copy on counsel for Dorothea W. Huszagh, who has filed in each of said cases her brief in opposition to each of said petitions. The briefs filed on behalf of Mrs. Huszagh are identical, except that the appropriate case numbers are printed on each of the 40 copies filed in this court in regard to each of the three cases. The petitioner, without notice, obtained an extension giving him the maximum time allowed by law to file his petitions for certiorari and serve respondents. At no time has he served this respondent with a copy of the record in any of the cases, although more than twenty days beyond the maximum period of five months since the entry of the judgment of the state Supreme Court have elapsed. It is submitted that petitioner's failure to serve respondents with a copy of the petition and the record filed in each case within the maximum time allowed by statute and rules of this court is, of itself, sufficient ground to deny each of petitioner's petitions.

The only question necessarily involved in the decision made by the state Supreme Court was whether, as a matter of state law, a consent decree can be attacked by a party to such decree solely on the ground of an alleged mistake of law. The bankruptcy act does not purport to grant to

a trustee in bankruptcy any right to attack, on the ground of a mere mistake in state law, a decree of a state court which had become, according to state law, *res adjudicata* more than four months prior to bankruptcy.

The state Supreme Court, in holding that no bill of review would lie either at the instance of the petitioner or at the instance of the counterclaimant, Mrs. Huszagh (the former bankrupt), to set aside the decrees, found as a matter of fact that the decrees were consent decrees and also that for a valuable consideration Mrs. Huszagh, more than four months prior to bankruptcy, had compromised and settled all matters in litigation with Cardwell (judgment creditor) and had agreed not to litigate further any matters pertaining to the creditor's bill proceeding in which the decrees sought to be attacked collaterally were entered.

There is no substantial or important question of law presented by the record. The entire issue below, as far as each of three petitions for certiorari are concerned, is a question of fact in a single case as to whether the decrees sought to be attacked were consent decrees and if, for a valuable consideration, Mrs. Huszagh more than four months prior to bankruptcy had agreed not to file a bill of review. With regard to the facts mentioned, the findings of the trial court were confirmed by the state Supreme Court and this court does not grant certiorari to review findings of fact or to weigh evidence.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner's "Summary Statement of Matter Involved" is inaccurate and insufficient.

Cardwell, having obtained a judgment on personal service against Mrs. Huszagh, and having execution returned *nulla bona*, filed his creditor's bill in the Circuit Court of

Lake County, Illinois, against Mrs. Huszagh and Fred J. Wegg, as trustee under the last will of Frederick H. Wickett, deceased, who was the late father of Mrs. Huszagh. Under the will of Frederick H. Wickett, deceased, a trust estate was created for the support and maintenance of Mrs. Huszagh, a widow, her six minor children and her sister.

In the creditor's bill suit a decree was entered on November 17, 1939 (Rec. 17-23), which found and adjudicated that the court had heard evidence, had jurisdiction over the parties and the subject matter of the suit; that her interest in the trust estate created by her father's will was subject to sale in order to pay Cardwell's judgment. At the time that decree was entered, there was no other judgment against Mrs. Huszagh and no possible question of bankruptcy law was passed on by the state trial court in entering its decree in the creditor's bill suit, more than ten months prior to bankruptcy.

Seven days after the entry of that decree and within term time, during which the Illinois court had a right to vacate the decree on its motion or on motion of counsel, Mrs. Huszagh, with the advice of her attorney, made and entered into an agreement with Cardwell (Rec. 81-88) pursuant to which for a valuable consideration she agreed that the decree of sale entered in the creditor's suit be carried out according to its intent, which required a sale of Mrs. Huszagh's beneficial interest in the trust at public vendue, and that Mrs. Huszagh would not litigate the matters involved in the creditor's suit further and, in particular, that she would not take an appeal or file a bill of review to attack the decree. Upon advertisement, the sale was carried out, a report of sale was made to the court and, by agreement between the attorneys for Mrs. Huszagh and Cardwell, the judgment creditor, the report of sale was approved ten months before bankruptcy.

In his agreement with Mrs. Huszagh, Cardwell agreed to satisfy the judgment he had obtained at law in another case, irrespective of the amount realized at the master's sale; that if there was an overplus at the master's sale, it would go to Mrs. Huszagh; that Cardwell, in any event, would pay the costs of the proceeding, including master's fees, commissions and expenses (Rec. 81-88). The agreement between Mrs. Huszagh and Cardwell was fully executed (see Opinion of trial court (Rec. 98) and final decree of trial court in bill of review case (Rec. 66-67), and Opinion of Illinois Supreme Court in regard to which having not been served with a copy of the record we cannot cite by the page).

After the entry of the decree approving the master's report of sale in the creditor's suit, a deficiency decree was entered in another case against Mrs. Huszagh with regard to a bond issue (Rec. 77) which she had signed fifteen years ago as an accommodation maker, and such deficiency decree was the only basis of the claim filed in her bankruptcy proceeding.

The petitioner, as the trustee in bankruptcy, a few days less than a year after the decree of sale had been entered in the creditor's suit, filed his bill of review in the Circuit Court of Lake County, Illinois, against Mrs. Huszagh, Cardwell and Fred J. Wegg, as trustee under the will creating the trust, seeking to set aside the two decrees in the creditor's suit solely on the ground that such decrees were entered as a matter of mistake of law because they countervened the provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes.

The state trial court (Rec. 66-67) and state Supreme Court held that no bill of review would lie to set aside consent decrees on the ground of a mistake of law; that Mrs. Huszagh and the petitioner claiming through her, after the lapse of more than four months, were estopped

from maintaining a bill of review by the agreement Mrs. Huszagh made with Cardwell. The opinion of trial court in bill of review case shows that no question of bankruptcy law was involved (Rec. 98) and the decree of the trial court in the case last mentioned does likewise (Rec. 66-67). The state Supreme Court affirmed this decree.

The decree of sale in the creditor's suit is of vital interest to Mrs. Huszagh because it adjudicated (Rec. 17-23) the account between her and Fred J. Wegg, as trustee under her late father's will. According to the will of Mrs. Huszagh's late father, Fred J. Wegg, trustee (Rec. 15), is authorized to give any part of the trust estate to any relative in need, which would include any or all of the six minor children of Mrs. Huszagh. In another suit to construe the will of Mrs. Huszagh's father, the trustee in bankruptcy, although he has not established any right to take the beneficial interest formerly owned by Mrs. Huszagh in the trust estate, has taken what counsel for this respondent regards as a hostile attitude to the rights of Mrs. Huszagh's children. The pendency of another suit is *de hors* of the record in this case, and although it exists in fact it may be treated in this brief only as a possibility in this case. With these facts mentioned, any attack on Mrs. Huszagh for opposing, as she is entitled to do by law (*In re Barnett*, 124 F. (2d) 1005), the three petitions for certiorari filed, more readily may be shown to be immaterial to the consideration of the merits of petitioner's petitions, which must be based on the record herein.

ARGUMENT.

The cross-complaint for review of Mrs. Huszagh, seeking to set aside the decrees in the creditor's bill suit, was predicated (Rec. 43) upon the theory that her interest in the active trust estate created by the last will of her late father for her support and benefit was a spendthrift trust, and being a spendthrift trust Mrs. Huszagh could make no agreement relating to her interest which would operate as a transfer of her interest to Cardwell. At no time in the state court proceedings did Mrs. Huszagh in any way seek to repudiate the agreement which she made and entered into with Cardwell, wherein for a valuable consideration she agreed not to contest further the matters involved in the creditor's suit and, in particular (Rec. 82), not to file a bill of review. The only ground urged by her is although she made such an agreement for a valuable consideration, such agreement pertained to an interest in a spendthrift trust, which she could not transfer or in any wise alienate by her own agreement. If such contention were not correct, then her counsel does not dispute the rule of law well established in Illinois and in federal courts to the effect that a bill of review does not lie to impeach a consent decree. *Harding* v. *Harding,* 198 U. S. 317. The only ground upon which the controlling effect of this rule of law would not be applicable to the facts in the case at bar is on the ground that the nature of Mrs. Huszagh's interest in the trust estate was such that she was not competent to make a contract concerning it.

The trial court (Rec. 66 and 98) and the state Supreme Court, and its opinion, (since the petitioner never served a copy of the record on this respondent, our reference to

state Supreme Court's opinion cannot cite the record page of such opinion) specifically found that the interest was of a character concerning which Mrs. Huszagh was competent to make a contract and that she was bound by her agreement. The Appellate Court of Illinois found that Mrs. Huszagh was bound by her agreement, but held that her trustee in bankruptcy, although more than four months had elapsed since the time of the making of her agreement and the filing of her petition in bankruptcy, was not bound by such agreement. The agreement, according to Illinois law, when made in term time (*Bushnell* v. *Cooper*, 289 Ill. 260, 267), if binding on Mrs. Huszagh made the decree in the creditor's suit sought to be attacked a consent decree, and made the decree *res adjudicata* more than four months before the filing of a petition in bankruptcy. (*Hempstead* v. *Broad*, 275 Ill. 358, 365.) It is anomaly in legal theory for a court to hold that an agreement is legally binding on the parties to the agreement but not on a party claiming after the lapse of more than four months thru one of the parties to such an agreement when the good faith of the agreement is admitted (Rec. 87). There is no provision of the bankruptcy law which, after the lapse of four months, entitles the trustee in bankruptcy to nullify a bona fide agreement which the court finds was legal and valid, and still binding on the parties to such agreement. A decree in a non-bankruptcy court, predicated on the validity of a lien arising before the four months' period, is *res adjudicata* in a bankruptcy court or in a plenary suit filed by the trustee in bankruptcy in the state court.

On behalf of Mrs. Huszagh it is contended that the express provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes, as repeatedly construed by the Illinois Supreme Court and the United State Supreme Court create a rule of property and not merely a rule of procedure; (*Potter* v. *Couch*, 141 U. S. 296, 319; *Spindle* v. *Shreve*, 111 U. S. 543, 548) that the effect of that statute, which

has been in force continuously since 1845, was to make any active trust created in good faith by a resident of Illinois for the support and maintenance of another not subject to the payment of the debts of the beneficiary. This is clearly shown in the recent decision of *Knight* v. *Gregory,* 389 Ill. 554, 561, construing the statute in question. In the case last mentioned, the state Supreme Court stated that the interest of the beneficiary in a trust of the character mentioned, by virtue of the provisions of the Illinois statute, is just as exempt from the payment of debts of a beneficiary as is an interest in a typical so-called spendthrift trust.

The effect of the Illinois statute has been stated by the author in 119 A. L. R. 41 as follows:

> "* * * the effect of the statute appears to be to make all trusts, except those for the benefit of the settlor, spendthrift trusts as against creditors of the beneficiary."

The petitioner ignoring the nature of his bill of review as a collateral attack and assuming that he is trying the merits of the creditor's suit *de novo,* contends that the decision of the Illinois Supreme Court "is contary to *Eaton* v. *Boston Safe Deposit and Trust Company,* 240 U. S. 427." This case has been cited by this respondent in support of the decision of the Illinois Supreme Court because Justice Holmes stated at pages 428, 429, in the court's opinion that:

> "It is established law in Massachusetts that such trusts are valid and effective against creditors, *Broadway National Bank* v. *Adams,* 133 Massachusetts, 170, and, subject to what we are about to say, against assignees in insolvency or trustees in bankruptcy. *Billings* v. *Marsh,* 153 Massachusetts, 311. *Munroe* v. *Dewey,* 176 Massachusetts, 184. The trustee in bankruptcy seeks to avoid the effect of these decisions on the ground that Mrs. Luke's equitable life interest was held by the Supreme Court of the State to be assign-

able, and that therefore it passed under § 70a (5) of the Bankruptcy Act, vesting in the trustee all property that the bankrupt 'could by any means have transferred.' The Supreme Judicial Court, however, held that the above cited cases governed and that the property did not pass. 220 Massachusetts, 484.

* * *

"The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it. *Dunn* v. *Dobson,* 198 Massachusetts, 142, 146. *Lathrop* v. *Merrill,* 207 Massachusetts, 6, 9. Whatever may have been the criticisms upon the policy and soundness of the doctrine, and whatever may be the power of this court to weigh the reasoning upon which it has been established by the Massachusetts cases, *Page* v. *Edmunds,* 187 U. S. 596, 602, it has been established too long and is too nearly sanctioned by the decisions of this court to be overthrown here. *Nichols* v. *Eaton,* 91 U. S. 716. *Shelton* v. *King,* 229 U. S. 90, 99. The policy of the Bankruptcy Act is to respect state exemptions, and until the Massachusetts decisions shall have gone farther than they yet have we are not prepared to say that the present bequest is not protected by the Massachusetts rule."

The petitioner refers in his petition not to what was the actual decision of this court in the case last mentioned, which affirmed the judgment of the Massachusetts Supreme Court, but he quotes a part of the discussion in the opinion which is in no wise applicable to the case at bar and which might relate to a case in which the bankrupt "could have freed from the trust *both the fund* and any proceeds received by her." In the case at bar, no one contends that Mrs. Huszagh "could have assigned her interest and by so doing could have freed from the trust *both the fund* and any proceeds received by her." According to the will of her late father (Rec. 15) creating the trust, Mrs. Huszagh's interest in the trust was a contingent interest, dependent not only upon her

continuing life but also dependent upon whether the trustee under the will would give away the corpus to a relative of the testator in need. Under the terms of her father's will, never could Mrs. Huszagh have freed the fund from the trust. Furthermore, in the case at bar the Illinois Supreme Court determined that the proper construction of Section 49 of Chapter 22 of the Illinois Revised Statutes "as limiting the character of the equitable property and inherent in it" with regard to the equitable interest of Mrs. Huszagh in the trust created by her late father's will. This court follows the construction of a state statute as made by the state Supreme Court.

As stated at page 946 of Collier's Bankruptcy, Vol. 4 (14th Edition):

> "The courts are frequently moved to reassert the general rule that the act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or his creditors at the time the trustee's title accrues."

The petitioner contends that the decision of the Illinois Supreme Court to the effect that Mrs. Huszagh was estopped by her agreement made with Cardwell ten months before bankruptcy was correct in so far it relates to Mrs. Huszagh, and, therefore, he cannot contend logically that he derived any right under Section 70a(5) from Mrs. Huszagh who had bargained away her right ten months before bankruptcy. The only right, if any, which would be left to the petitioner was the right similar to that of a judgment creditor under Section 70c of the bankruptcy act. However, the petitioner also contends that a judgment creditor in Illinois has no right to subject the former interest of Mrs. Huszagh to the payment of a judgment; and he, therefore, disclaims any rights under Section 70c of the bankruptcy act. Having no rights to maintain an adverse plenary suit against Wegg, as trustee under the

will, or against Cardwell, or Mrs. Huszagh, who has received her discharge in bankruptcy (Rec. 96) under Section 70c, and since Mrs. Huszagh had no title to her interest in the trust to give the petitioner at the time she filed her petition in bankruptcy, the Illinois Supreme Court was right in holding that the petitioner had no right to maintain his bill of review.

The discussion which the Illinois Supreme Court made in its opinion of the bankruptcy act was not the basis of its judgment, which held that under the state law a consent decree made ten months before bankruptcy could not be set aside on the sole ground of an alleged error of law. The opinion of any court is not broader than the facts in a particular case in which it is rendered. However, it is submitted, the scope of section 70c of the bankruptcy act was correctly delineated in the opinion of the Illinois Supreme Court.

The purpose of Section 70c is set forth in a note prepared by its draftsmen—and appearing at 45 Cong. Rec. 2277 (1910). (Reproduced in Collier, 14th Ed., Vol. 4, page 1252, as follows:)

> " 'The proposed amendment, while correcting the defect named, (secret liens) at the same time carefully guards the rights of all parties. It is evident that in the proposed amendment attempt is made to give effect to two ideas, quite distinct: First, that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under state law; and, second, that *as to property not in the custody of the bankruptcy court, the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an individual creditor might have done to subject assets. In this way, in effect, proceedings in bankruptcy will give to creditors the same rights that*

creditors under the state law would have had had there been no bankruptcy, and from which they are debarred by the bankruptcy—certainly a very desirable and eminently fair position to be granted to the trustee.' 45 Cong. Rec. 2277 (1910)." (Matter in parenthesis and italics added.)

The state Supreme Court, in applying Section 70c with respect to the trust interest of Mrs. Huszagh did just as the draftsmen intended. The court decided that "in effect, proceedings in bankruptcy will give to creditors the same rights that creditors under the state law would have had had there been no bankruptcy, * * *." Petitioner not only concedes, but, in fact, he predicated his bill of review on the sole premise that because of the effect of Section 49 of Chapter 22 of the Illinois Revised Statutes no creditor in Illinois could subject the interest of Mrs. Huszagh in the trust to the payment of a judgment.

It would create an anomalous situation fraught with many difficulties to mix indiscriminately the matter of remedies with the matter of property rights, with avowed intention of cutting down a bankrupt's property rights under state statutes and decisions by giving to the trustee in bankruptcy greater remedies as plaintiff in a plenary suit filed by him in the state court than would be afforded any other plaintiff of any kind or description whatsoever, with the net result that an interest in a trust estate, which under the Illinois laws could not be taken for the payment of a debt, could be taken in a plenary suit for the payment of a debt only by a trustee in bankruptcy. It always has been the policy of Congress in enacting all bankruptcy laws to respect property rights created by state law. In such states as recognize the validity of spendthrift trusts, the courts recognize the particular character or property right of such interest and will not permit the trustee in bankruptcy to recover it. The property right given to the beneficiary in a trust within the purview of

Section 49 of the Illinois Chancery Act is just as sacred in contemplation of the bankruptcy law as would be the same right if it were merely defined categorically in the instrument creating the trust, as immune from liability to pay debts. Under the laws of the State of Illinois, it is just as free from liability to pay debts as an interest in a trust specifically characterized in the instrument creating the trust, as a property right free from any liability to pay the debts of the beneficiary. (*Knight* v. *Gregory*, 389 Ill. 554, 561.) The will of Mrs. Huszagh's father creating the trust must be read in contemplation of the then existing Section 49 of Chapter 22 of the Illinois Revised Statutes to the same extent as if the testator quoted the statute last mentioned in his will.

The petitioner cannot argue properly that the interest of a beneficiary in a spendthrift trust, or any trust created in good faith by a person other than the beneficiary made just as immune from the attacks of a creditor as a spendthrift trust by virtue of the public policy of the State of Illinois as evidenced by Section 49 of Chapter 22 of the Illinois Revised Statutes, can be taken, administered and sold by a trustee in bankruptcy of the beneficiary. There is no basis in the bankruptcy law for discrimination between interests in trusts of the character just mentioned, which have the common characteristic of not being subject to be taken for a debt of the beneficiary. If there were any difference, the stronger case is made for the trust within the purview of the state statute. Furthermore, such a question was not presented by the facts in the case at bar to the Illinois Supreme Court, which held that the consent decrees in the creditor's suit could not be attacked collaterally for a mistake of law after the lapse of four months before bankruptcy. The primary question before the Illinois Supreme Court was the validity of the consent decrees attacked collaterally. The petitioner argues his case in his petition as if he were trying the creditor's suit

de novo in his bill of review, which he cannot do according to the judgment of the Illinois Supreme Court.

The United States Supreme Court, in the matter of construing the force and effect of Section 49 of Chapter 22 of the Illinois Revised Statutes, follows the decision of the Illinois Supreme Court. (*Erie* v. *Thompson,* 304 U. S. 64; *Page* v. *Edmunds,* 187 U. S. 596, 602.)

In any case, the question of the availability of a bankrupt's trust income to the trustee in bankruptcy is to be determined by the law of the situs of the trust, and the trustee must bring a plenary action authorized by the state law against the party holding an adverse interest and the trustee of the trust estate. (*Cline* v. *Kaplan,* 323 U. S. 97; *In re Baudouine,* 101 Fed. 574; *In re Whitney,* 113 F. (2d) 426, 428, 429). In the case last mentioned, the Circuit Court of Appeals of the Second Circuit stated at pages 428-9 of its opinion:

> "* * * The interest of a *cestui* in a trust is not like an interest in a stock exchange seat. * * *
>
> "The property in the hands of the Fiduciary Trust Company was not in the actual or constructive possession of the bankruptcy court. That company was an adverse claimant entitled to litigate its claims in the prior state court suit without interference from the bankruptcy court."

In the case of *In re Allee,* 55 F. (2d) 76, at page 77, the Circuit Court of Appeals stated:

> "This court has held that such trustee (in bankruptcy) is not to be considered as a purchaser for value, but that his powers, rights, and title are the same as any other judgment creditor, who holds a returned and unsatisfied execution, and that he cannot in any case take property not belonging to the bankrupt."

In *Cline* v. *Kaplan,* 323 U. S. 97, in an opinion by Justice Frankfurter, this court stated in its opinion:

> "If the property is not in the court's possession and a third party asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated in suits of the ordinary character, with the rights and remedies incident thereto."

Suits of "an ordinary character and with the rights and remedies incident thereto" would not sanction the granting of relief to a trustee in bankruptcy as the plaintiff in a state plenary suit not available to any other plaintiff in any other case in such state court.

Nearly all property of a bankrupt not subject to the claims of creditors can be transferred or in some manner alienated by him. The United States Supreme Court will construe the state statute to give an interest in a trust, within the statute, a different character, not inherent in it. The right of homestead, rights to insurance in favor of widows, and the like, can be released by the bankrupt, but the trustee in bankruptcy cannot claim them under Section 70a(5) of the bankruptcy act as property which the bankrupt by any means could have transferred, in case where the state statute makes such interests immune from the claims of creditors. There are a number of so-called "rights" of a bankrupt which more than four months prior to bankruptcy the judgment debtor could compromise, settle or alienate, in good faith, for a valuable consideration, which do not pass to a trustee in bankruptcy. It has been held that since a creditor under state law cannot avoid the assignment of mere expectancy, his trustee in bankruptcy cannot do so. (*In re Barnett*, 124 F. (2d) 1005) (2nd Cir. Ct. of Appeals.) The mere expectancy could not be taken for the payment of a debt at the time it was assigned, and at a later date although the expectancy changed, the trustee in bankruptcy could not set aside the assignment.

A contingent attorney's fee not fully earned is not property which passes to the trustee in bankruptcy, although

the court held that it was assignable, or could be compromised or released. (*In re Coleman, Attorney*, 87 F. (2d) 753.) The fee of a trustee is not fully earned until the estate is closed, and does not pass to the trustee in bankruptcy. (*In re Furness*, 75 F. (2d) 965) (2nd Cir. Ct. of Appeals.)

The petitioner contends that Mrs. Huszagh could have assigned her interest in the trust created by her father's will and, therefore, it "passed" to the trustee in bankruptcy. However, the flaw in his argument is obvious because the interest was in Cardwell more than ten months before bankruptcy and did not pass from Cardwell to the trustee in bankruptcy when Mrs. Huszagh filed her voluntary petition in bankruptcy. Furthermore, if Mrs. Huszagh could assign or transfer her interest, there is no basis for the contention that by virtue of her agreement with Cardwell, which she had a right to make, with the advice of her counsel, according to the Illinois Supreme Court, she did not transfer. (*Hudnall* v. *Ham*, 183 Ill. 486.) If her interest were to any extent transferable and were not an interest in a typical spendthrift trust, she could make by contract a consent decree just as well as she could make a bill of sale or other written assignment. (*King* v. *King*, 215 Ill. 100, 115, 119.) However, in the case at bar. Mrs. Huszagh could not transfer any right to the trust *res* (see Will, Rec. 12-15) within the dictum of *Eaton* v. *Boston Safe Deposit and Trust Company*, 240 U. S. 427. The case at bar is stronger against the petitioner than the actual decision of the Court in the case last mentioned, because in the case at bar the state Supreme Court construed the effect of an Illinois statute as effecting the immunity or particular character of the interest of Mrs. Huszagh in the trust; and the United States Supreme Court adopts the construction placed upon an Illinois statute by the Illinois Supreme Court. Furthermore, in the case at bar the creditor's bill suit cannot be tried *de novo* by the petitioner's bill of review, and consent decrees entered more than

four months before bankruptcy, not set aside by the judgment of the Illinois Supreme Court, will not be set aside by this court, because no question of bankruptcy law was involved in the matter of entering the decrees in the creditor's suit.

In the case at bar, we are not met with a mere judicial construction of the common law of the State of Illinois as to whether the interest of Mrs. Huszagh passed to Cardwell more than ten months prior to bankruptcy, and did not pass to her trustee in bankruptcy when Mrs. Huszagh filed her petition in bankruptcy. By virtue of the express provisions of Section 49 of Chapter 22 of the Illinois Revised Stautes, we are met with a construction of a state statute, the effect of which is to make the interest of the beneficiary in the trust of the character created by the last will of Mrs. Huszagh's father immune from claims of all judgment creditors or other debts and, therefore, *ipso facto* immune from the claim of the trustee in bankruptcy, who is merely the *alter ego* of a creditor. The immunity of the interest in the Illinois trust created by another is just as inherent in it as is the immunity of an interest in a typical spendthrift trust. The trustee in bankruptcy contends that the interest, as far as it pertains to current income, may be transferred by the beneficiary, but, if so, he fails to grasp the fact that the beneficiary can consent in another lawsuit concluded more than ten months prior to bankruptcy to waive her immunity for a valuable consideration. In fact, the petitioner argues that the interest is immune as to any creditor, unless such creditor have as his intercessor in a plenary suit in an Illinois court the trustee in bankruptcy. Without any claim filed in bankruptcy, a trustee in bankruptcy could not maintain suit to recover alleged assets of the bankrupt. He does not function for his own benefit, but for the benefit of creditors, who have filed a claim. In the case at bar, the petitioner goes further than merely erroneously seek-

ing to maintain a *de novo* suit regarding Mrs. Huszagh's interest; he contends that he can set aside judicial proceedings concluded in good faith more than four months prior to bankruptcy, which had become *res adjudicata* as to the bankrupt more than four months prior to bankruptcy. In other words, the petitioner contends that the trustee in bankruptcy is given a right to proceed in a plenary suit in a state court, and, according to the state law, which would not redound under any circumstances whatsoever, to any other plaintiff in any other case. He seeks to revamp by forced construction, Section 49 of Chapter 22 of the Illinois Revised Statutes to read in effect that it is the intention of the State legislature that this section shall have no application to any suit brought by a trustee in bankruptcy. However, the rule created by the statute mentioned is not a rule of procedure depending upon what party is the plaintiff, as the petitioner contends, but is a rule of property which applies to all litigants, whether such litigant be a trustee in bankruptcy or a judgment creditor representing himself.

It has repeatedly been held by the United States Supreme Court and courts of various jurisdictions that an interest in a trust estate which, according to the law of the state in which such interest was created and in which the bankrupt was domiciled, was not subject to the payment of his debts, is not of a character which passes to a trustee in bankruptcy. In the case at bar, this would be readily admitted by counsel for the petitioner as to the spendthrift trust. The character of the label attached to such interest in the Illinois trust protected by the Illinois statute is immaterial. As far as the bankruptcy act is concerned, there is no more difficulty incurred in holding that the interest of a beneficiary in a trust protected or construed as within the purview of Section 49 of Chapter 22 of the Illinois Revised Statutes, does pass to a trustee in bankruptcy, than there is to hold that the in-

terest in a typical spendthrift trust does not pass to the trustee in bankruptcy. In some states spendthrift trusts are not recognized as valid, but in Illinois and other states where they are valid the interest in such trust does not pass to a trustee in bankruptcy. Even if there had been no creditor's bill proceeding, the petitioner has no right to succeed in a plenary suit in the state court against the beneficiary and the trustee under the will creating the trust, protected against the claims of creditors by virtue of Section 49 of Chapter 22 of the Illinois Revised Statutes. The interest of the beneficiary in the trust estate, in the case at bar, by virtue of Section 49 of Chapter 22 of the Illinois Revised Statutes, is just as immune from the claim of creditors as is the interest of a beneficiary in a typical spendthrift trust. (*Knight* v. *Gregory*, 389 Ill. 554, 561.) By judicial proceedings in a state court the trustee in bankruptcy seeks to take for the benefit of the single creditor represented by him, as trustee in bankruptcy, the identical interest in a trust which, he argues, is protected by the positive enactment of the Illinois statute from the claims of all creditors in any sort of an action in any court in the state of Illinois. The Illinois statute does not purport to discriminate in favor of a creditor represented by a trustee in bankruptcy.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes, which must be read as if incorporated in every will creating in good faith a trust for support of another since the time this statute was passed in 1845, is a rule of property characterizing the beneficiary's interest in such trust. This principle was recognized in the case of *Potter* v. *Couch*, 141 U. S. 296, 312; *Spindle* v. *Shreve*, 111 U. S. 543, 548; *Hull* v. *Farmers Loan & Trust Co.*, 245 U. S. 312, as well as *Eaton* v. *Boston Safe Deposit & Trust Co.*, 240 U. S. 427. However, the question of the immunity of Mrs. Huszagh's interest was not before the state Supreme Court for its determination, because the Supreme

Court of Illinois held that for a valuable consideration the beneficiary in the trust could waive or release her immunity and that Mrs. Huszagh had done so more than ten months before bankruptcy. The fact that Mrs. Huszagh, as the beneficiary in the trust created by her father's will, could release her interest in the trust for a valuable consideration in a consent decree is not synonymous with a holding that interest so released was not within the purview of statutory created immunity. Furthermore, if there were no statutory immunity from liability to pay debts attached to Mrs. Huszagh's interest, then no error of law, aside from any question of consent, was incurred in the creditor's suit. The petitioner contends that every creditor except himself was barred by such immunity, but he was not a party to the creditor's suit. The agreement for release was made ten months before bankruptcy and related to a subject matter concerning which the Illinois Supreme Court stated that she was competent to contract. If Mrs. Huszagh's interest in the trust created by her father's will was not a matter concerning which she was competent to make a contract with Cardwell, it certainly was not an interest which could be transferred by her. The judgment of the state Supreme Court to the effect that she made a valid contract with Cardwell ten months before bankruptcy was the determination of a question of state law, which this court will not review. It related to proceedings concluded ten months before bankruptcy.

Section 70a of the bankruptcy act does not define exemptions and does not purport to create substantive rights and formerly non-existing remedies in favor of the trustee in bankruptcy, (*Holden* v. *Stratton*, 198 U. S. 202; *Steele* v. *Buel*, 104 Fed. 968) which in any wise would militate against or change the construction of the Illinois statute, namely, Section 49 of Chapter 22 of the Illinois Revised Statutes, relating to the character of the beneficiary's interest in a trust estate created in good faith by someone

else for the support and maintenance of another person. It is a confusion of thought to call any kind of a claim a "right" and then, upon the basis of such alleged "right" to contend that property rights under the Illinois statute have been changed. A trustee in bankruptcy, by virtue of the bankruptcy act, is given such specific powers as are therein enumerated, but there is no provision in the act which purports to make property not in the hands of the bankrupt but held in trust for him and others on an active trust amenable to the payment of bankrupt's debts, as represented by the trustee in bankruptcy, when a particular interest in the trust property is immune, by reason of the positive enactment of the state law, from the claim of any creditor. The filing of bankruptcy did not change the effect and validity of a state court's decree in the creditor's suit, which, according to the holding of the Illinois Supreme Court, had become *res adjudicata* more than four months before it was attacked by the petitioner's bill of review.

Petitioner contends that the decrees in the creditor's suit, which both he and Mrs. Huszagh attacked collaterally, petitioner by his bill of review and Mrs. Huszagh by her counterclaim for review, should be regarded as binding upon Mrs. Huszagh, but since Mrs. Huszagh ten months later filed her petition in bankruptcy, the identical decrees, as a matter of law, should be regarded as "changed" by the bankruptcy act, only as far as the rights of the petitioner are concerned. The correctness of the decrees in the creditor's suit, at the time they were entered, was a question to be determined solely by state law, and the only ground upon which the petitioner attacks the correctness of such decrees as of the time they were entered was that they were entered in contravention of the state statute, namely, Section 49 of Chapter 22 of the Illinois Revised Statutes. Not only was the correctness of the decrees, when entered, in the creditor's suit a question of state law,

but the question of the correctness of such decrees when attacked collaterally still remains solely a question of state law and their validity still relates back to the time of their entry which was ten months prior to bankruptcy. The state Supreme Court decided only a question of state law when it held that such decrees could not be attacked collaterally by the petitioner's bill of review or by Mrs. Huszagh's counter-claim for review. If the Supreme Court merely had denied relief to the trustee in bankruptcy and had given relief to Mrs. Huszagh, then it would have decided that there was error in the trial court's decree. By affirming the trial court's decree the state Supreme Court held that the decree was valid at the time of its entry.

It is not true, as petitioner argues, that the section of the Illinois Statute mentioned pertains only to creditors' suits. It is not a mere rule of procedure but a rule of property, and the interest is immune from the claims of creditors no matter what is the form of judicial procedure, whether in equity or at law. *Potter* v. *Couch,* 141 U. S. 296, 319; *Dunham* v. *Kauffman,* 385 Ill. 79; *Baumgarden* v. *Reconstruction Finance Corporation,* 131 Fed. (2d) 741.

If it still be argued that Section 49 of Chapter 22 of the Illinois Revised Statutes appertains only to matters of procedure and not to matters of substance, then it must be borne in mind that according to the laws of the State of Illinois no bill of review lies to correct a decree only on the ground of alleged error in procedure. *Vyverberg* v. *Vyverberg,* 310 Ill. 599; *Knaus* v. *Chicago Title and Trust Company,* 365 Ill. 588, 592, 593; *Cullen* v. *Stevens,* 389 Ill. 35.

The United States Supreme Court from the time of its foundation has adhered to the principle that it will not review judgments of the state court that rest on adequate and independent state grounds, and that it will not use

its power merely to correct allegedly wrong judgments, and to revise opinions. The state Supreme Court by affirming the trial court decree, refused to set aside a former decree of the trial court, attacked collaterally, and in so doing it decided a question of state law which previously had been determined ten months before bankruptcy and therefore, did not involve and could not involve any question of bankruptcy law.

Mrs. Huszagh filed no petition for a writ of certiorari in this court because her counsel is of the opinion that no federal question was involved in the decision of the Illinois Supreme Court. If there was an error in judgment of the State Supreme Court such error only affected the rights of Mrs. Huszagh, which she has sought to protect throughout the litigation.

CONCLUSION.

No question of federal law is involved in this cause, and each of the three petitions for writ of certiorari in cases 823, 824 and 825 should be denied.

Respectfully submitted,

MAURICE P. GOLDEN,
Chicago, Illinois,
Attorney for the Respondent,
Dorothea W. Huszagh.

EDWARD G. BERGLUND,
of Chicago, Illinois,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 825

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF DOROTHEA W. HUSZAGH,
Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH AND FRED J. WEGG, AS THE SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED,
Respondents.

BRIEF OF JAMES R. CARDWELL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION BELOW.

The opinion below is reported in 390 Illinois Supreme Court Reports at page 526 (advance sheets, 390 Ill. No. 6), and is set forth in full in the appendix hereto. It also appears (Rec. pp. 125-132).

STATEMENT MAKING AGAINST JURISDICTION.

Petitioner has not appended to his petition a copy of the opinion of the Supreme Court of Illinois, as required by rule 12, paragraph 1, of this court. Contrary to the rules

of this court, petitioner annexed to his petition a copy of the second opinion of the Illinois Appellate Court. Petitioner has not furnished an index to the record of the Illinois Supreme Court.

There was an adequate and independent non-federal ground of decision to support the judgment of the state Supreme Court. The advent of bankruptcy *ipso facto*, occuring more than four months after the entry of the decrees sought to be attacked, collaterally, solely on the ground of an alleged error of law (Rec. 27), in no wise affected the vadility of such decrees. The sole issue sought to be raised in the trustee in bankruptcy's bill of review was whether, making particular reference to Section 49 of Chapter 22 of the Illinois Revised Statutes (Rec. 27-29; 129) the trial court in the creditor's suit committed an error of law in entering the decrees it entered in that case. No contention was made in any state court that the bankruptcy act was repugnant to the particular Illinois statute involved. The state Supreme Court affirmed the decree of the trial court dismissing for want of equity not only the complaint for review of the trustee in bankruptcy but also the counterclaim for review of Mrs. Huszagh filed in the identical suit; and the gist of its decision was that if there were any error of law committed by the state trial court in entering the decrees in the creditor's suit, a bill of review would not lie at the instance of the trustee in bankruptcy nor at the instance of the judgment debtor, because such decrees were entered more than four months prior to bankruptcy, and pursuant to an agreement made between Mrs. Huszagh (the former judgment debtor) and Cardwell (the former judgment creditor), which, as stated in the opinion of the state Supreme Court, "related to matters in which they were both competent to contract and resulted in the decrees entered by the trial court, becoming consent decrees" (Rec. 132).

The construction which the Illinois Supreme Court placed upon Section 49 of Chapter 22 of the Illinois Revised

Statutes (Rec. 130) related to the interpretation of an Illinois statute in regard to which the federal court would follow the state Supreme Court. The gravamen of the decision was to the effect that a consent decree made, as stated in the state Supreme Court's opinion (Rec. 132) between "parties competent to contract" and in regard to which "Cardwell could not be placed in *statu quo*" (Rec. 132) made the attacked decree *res adjudicata* more than four months prior to the advent of bankruptcy and Mrs. Huszagh, or anyone claiming thru her, after the lapse of more than four months was estopped (Rec. 132) from seeking to attack collaterally the consent decrees solely on the ground of an alleged error of law. Whether the decrees were consent decrees was a question of fact found by the trial court and confirmed by the Illinois Supreme Court, in regard to which this court does not grant certiorari to review.

No substantial or important question of law is presented by this record.

The entire issue below was one of fact.

As a further ground for showing that this court lacks jurisdiction, it should be noted that the petitioner filed three petitions for certiorari, Cases No. 823, 824 and 825. He only has served counsel for James R. Cardwell with a single copy of only one petition and a single copy of the record which bore all three case numbers on it. No order consolidating the three petitions has been entered, and the service of only one copy does not comply with the jurisdictional requirement of service of a copy of petition for certiorari on counsel for the respondent within ten days from the filing of each of such petitions in this court. In the absence of an order of consolidation in this court, each petition for certiorari stands as a separate case on its own merit as far as meeting the jurisdictional requirements of this court, including the matter of serving counsel for the respondents, is concerned.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner's "Summary Statement of the Matter Involved" is incorrect, incomplete and misleading.

On October 11, 1939, James R. Cardwell, a judgment creditor, filed in the Circuit Court of Lake County, Illinois, his creditor's bill (Rec. 5) making Dorothea W. Huszgah and Fred J. Wegg, as trustee under the last will and testament of Frederick H. Wickett, deceased, parties defendant thereto. In the pleadings filed in the creditor's bill suit, no mention was made of Section 49 of Chapter 22 of the Illinois Revised Statutes, which protects certain types of interests in active trusts created by another in good faith for continuing support of the beneficiary from being subjected to the payment of the debts of the beneficiary by any proceeding at law or in equity brought by a creditor. Dorothea W. Huszagh, in her answer (Rec. 15-17) to the creditor's bill, as a defense to the same alleged that the trust created by her late father's will was a spendthrift trust and as such was not subject to be taken for the payment of any judgment against her thru a creditor's bill. The court heard evidence but no transcript of evidence was preserved in the creditor's bill suit, the preservation of such evidence was not necessary under the Illinois law to sustain the validity of the decree.

On November 17, 1939, the state Circuit Court in the creditor's suit entered a decree of sale in which it was specifically found and decreed (Rec. 17-18) that the court had jurisdiction over the parties and the subject matter; that the trust in question was not a spendthrift trust and it was subject to be sold at public vendue to pay the judgment of Cardwell. The state statute cited (Sec. 49 of Chap. 22 Ill. Rev. Stat.) purports to protect only the interest of a beneficiary in a trust estate created in good faith by another. It is always a question of fact, shown by the evidence, whether the trust was created in good faith, and

on collateral attack in a bill of review the state court is not privileged to determine what evidence another court heard or did not hear. There was no proof in the bill of review case as to whether Mrs. Huszagh had contributed to the trust in question.

Seven days after the entry of the decree of sale in the creditor's suit and during term time of the court, Dorothea W. Huszagh made and entered into an agreement with Cardwell, in respect to which the Supreme Court of the State of Illinois in its opinion (Rec. 131-132) said:

> "Within seven days after the entry thereof, the attorney for Mrs. Huszagh approached counsel for Cardwell and asked him if his client would bid the full amount of his judgment upon which the creditor's bill was predicated, so that there would be no deficiency unsatisfied against Mrs. Huszagh. After a complete conversation, the attorney for Cardwell agreed that he would, on behalf of his client, satisfy the entire judgment if Mrs. Huszagh would agree not to litigate the case further. The proposition was submitted to Mrs. Huszagh and she approved the same and authorized her attorney to enter into such agreement. Pursuant to such arrangement, Cardwell was the successful bidder at the sale. He paid all of the costs, including the master's fees. He prepared a satisfaction piece which was approved by Mrs. Huszagh's attorney and filed in the cause. Both Mrs. Huszagh and her attorney testified to the facts above related in the bill of review hearing and the said agreement was fully executed. Mrs. Huszagh accepted the benefits of this agreement which was executed more than four months before she filed her petition in bankruptcy. Cardwell cannot now be placed *in statu quo* and we believe that Dorothea W. Huszagh is precluded and estopped from obtaining any relief under her counterclaim or from relitigating any of the questions determined in the creditor's suit. The trial court had full jurisdiction to pass upon all of the questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a

spendthrift trust. Dorothea W. Huszagh is now estopped from litigating those questions again in the bill of review case.

24. It appears clear to this Court that the agreement made between Mrs. Huszagh and Cardwell related to matters in which they were both competent to contract, and resulted in the decrees, entered by the trial court in the creditor's suit, becoming consent decrees."

After the making of this agreement, the Circuit Court by agreement of the parties entered its decree approving the master's report of sale (Rec. 84).

Ten months after the entry of the decrees mentioned, Mrs. Huszagh filed her voluntary petition in bankruptcy (Rec. 17; Rec. 4) and, thereafter, the petitioner filed his bill of review in the Circuit Court of Lake County, seeking to set aside the decree of sale and the decree approving the master's report of sale in the creditor's bill suit, on the ground that such decrees were entered erroneously because Section 49 of Chapter 22 of the Illinois Revised Statutes (Rec. 27-29) provided that an interest in a trust estate created in good faith by someone other than the beneficiary could not be taken and sold by any judicial process for the payment of a debt of the beneficiary (Rec. 28-29; 131).

The trial court dismissed the complaint filed by the petitioner and also the counterclaim for review filed by Mrs. Huszagh for want of equity, holding, as a matter of fact and of law, that by reason of the agreement which Mrs. Huszagh made and entered into with Cardwell the decrees sought to be attacked became consent decrees and that, furthermore, since Mrs. Huszagh for a valuable consideration had agreed not to take any steps to litigate further the subject matter of the creditor's bill suit or the decree of sale, by appeal, bill of review or otherwise; and since Cardwell could not be placed in *statu quo,* Mrs. Huszagh was estopped more than four months prior to the advent

of bankruptcy from attacking said decrees. Since Mrs. Huszagh for more than four months before bankruptcy had been estopped from attacking said decrees, her trustee in bankruptcy did not have any greater rights to attack (on the sole ground of a mistake of law) the decrees, than Mrs. Huszagh had four months prior to bankruptcy. In other words, the event of bankruptcy did not *ipso facto* recreate rights which had been bargained away in good faith and for a valuable consideration more than four months before bankruptcy.

The trial court in the bill of review case (Rec. 66) found that in the creditor's bill suit the court had jurisdiction over the parties and the subject matter of such decree, and the Supreme Court of Illinois in its opinion, confirmed the finding of the trial court, stating:

> "The trial court had full jurisdiction to pass upon all questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a spendthrift trust." (Rec. 132.)

NOTE: Since the petitioner did not attach a copy of the opinion of the Supreme Court to his petition, as is required by the rules of this court, this respondent has attached a copy of such opinion as an appendix to his brief for the convenience of the court.

THE QUESTIONS PRESENTED.

Although a variety of questions might be regarded as incidentally involved in the decision of the Illinois Supreme Court, that decision does not basically involve more than one question of fact in respect to which the testimony in the bill of review case was undisputed, namely, did Mrs. Huszagh and Cardwell within term time make and enter into an agreement whereby, for a valuable consideration, Mrs. Huszagh agreed not to litigate any further the matters involved in the creditor's bill suit, and by reason thereof the decrees in the creditor's bill case became consent decrees and whereby Mrs. Huszagh, more than four

months prior to the advent of bankruptcy, already was estopped from filing any bill of review or otherwise attacking the decrees in question.

As a matter of Illinois law, this respondent contends that the decrees in the creditor's suit were valid and not subject to any collateral attack, independently of the making of the agreement between Cardwell and Mrs. Huszagh; because the validity of the creditor's bill suit on a collateral attack does not depend upon technical correctness of any pleadings in such suit but upon the evidence heard and considered by the trial court in the creditor's suit (*Stoll* v. *Gottlieb*, 305 U. S. 165, 172, 176), which was not preserved and which, if it was preserved, could not be considered on a collateral attack; and because the unknown evidence in the creditor's suit might have indicated that Mrs. Huszagh had contributed to the trust in question and then, under the Illinois authorities, she would not be entitled to the protection of Section 49 of Chapter 22 of the Illinois Revised Statutes. (*Requa* v. *Graham*, 187 Ill. 67.) Furthermore, her failure to plead or interpose the defense of that statute precluded her from attacking the decrees of the trial court upon the ground of the error claimed by her trustee in bankruptcy.

At the time of the entry of the decrees in the creditor's bill suit sought to be attacked collaterally, no question of bankruptcy law was involved. Mrs. Huszagh did not file her petition in bankruptcy until ten months later (Rec. 4; 27-28.) The validity of the decrees attacked collaterally by a bill of review involved solely a question of state law, as that law was at the time of the entry of the decrees attacked.

The construction which the state Supreme Court placed upon Section 49 of Chapter 22 of the Illinois Revised Statutes was a matter of state law decided by a state court ten months before the advent of bankruptcy, and it did not involve the determination of any question of bankrupcy law.

PROPOSITIONS OF LAW.

I.

A bill of review does not lie to set aside a consent decree which relates only to private rights between parties competent to contract, who acted with the advice of their respective attorneys, in case where such decree was entered more than four months before bankruptcy and is attacked solely on the ground that the trial court committed an error of law in entering such decree.

Harding v. *Harding*, 198 U. S. 317, citing 11 Ill. 540.

Bergman v. *Rhodes*, 334 Ill. 137.

Crow v. *Harrison*, 248 Ill. 462.

King v. *King*, 215 Ill. 100, 115, 119 (did not challenge jurisdiction of court below cannot raise the same on appeal).

Armstrong v. *Cooper*, 11 Ill. 540.

Harrigan v. *County of Peoria*, 262 Ill. 36.

II.

In a case where no question of public policy is involved, and the parties are competent to contract, regarding the subject matter of their agreement, a defendant who, for a valuable consideration, has agreed to take no steps to attack the validity of the decree, ceases to have the right to do so, and it can make no difference whether the decree is erroneous or even void for want of jurisdiction, for the defendant is, nevertheless, bound by his agreement not to attack its validity.

Bergman v. *Rhodes*, 334 Ill. 137.

King v. *King*, 215 Ill. 100.

Smucker v. *Larimore*, 21 Ill. 267.

Corwin v. *Shoup*, 76 Ill. 246 (minor accepting proceeds of a void sale on becoming of age is estopped to prosecute writ of error).

Trapp v. *Off*, 194 Ill. 287.
Hudnall v. *Ham*, 183 Ill. 486.
Hempstead v. *Broad*, 282 Ill. 524.
Bonney v. *Lamb*, 210 Ill. 75, 98.

III.

The Supreme Court of the United States of America does not grant the writ of certiorari for the purpose of inquiring into the weight of the evidence and discussing specific facts in a case where the trial court and the Supreme Court of the State of Illinois have concurred in their findings to the effect that the decrees sought to be attacked collaterally were consent decrees.

United States of America v. *Commercial Credit Co.*, 286 U. S. 63, 67.

Luckenbach v. *McCahan Sugar Refining Co.*, 248 U. S. 139.

> "We do not grant a certiorari to review evidence and discuss specific facts."

United States of America v. *Johnston*, 268 U. S. 220, 227.

IV.

Since the protection, if any, afforded the defendant in a creditor's suit by Section 49 of Chapter 22, Illinois Revised Statutes, may be waived by the defendant and is waived if not asserted when opportunity is afforded, there was no error of law committed by the court in entering the decree in the creditor's suit.

Binns v. *La Forge*, 191 Ill. 598 (creditor's suit).
Wright v. *Dunning*, 46 Ill. 271, at 275 (foreclosure).
The People v. *Fisher*, 340 Ill. 250, at 261.
Harrigan v. *County of Peoria*, 262 Ill. 36.
Hunsley v. *Aull*, 387 Ill. 520, at 523.

V.

Section 49 of the Illinois Chancery Act (Chap. 22, Ill. Rev. Stat.) does not protect a trust which ostensibly proceeds from some person other than the defendant, if, in fact, the defendant directly or indirectly contributed any part of the trust fund, either at the time of its creation or subsequently thereto, and it is always a question of fact whether such defendant did contribute, which need not appear merely from the pleadings in the case, and such question of fact cannot be tried de novo by a bill of review.

Re Qua v. *Graham*, 187 Ill. 67.
Linn v. *Dowling*, 216 Ill. 64.
Harrigan v. *County of Peoria*, 262 Ill. 36.

VI.

A decree in a non-bankruptcy court predicated on the validity of a lien arising more than four months before bankruptcy is res adjudicata in a subsequent suit commenced by the trustee in bankruptcy.

Blair v. *Brailey*, 221 Fed. 1, 4. (Cir. Ct. of Appeals, 5th Circuit—cert. denied 238 U. S. 638.)

VII.

The trial court in reviewing its former decree, on hearing a bill of review for alleged error of law apparent on the record, where the former decree recites that testimony was heard, has no jurisdiction to make a ruling on the effect of going to trial in the case under review without a reply on file. The effect of going to trial without a reply on file cannot be determined from an examination of the pleadings alone, but depends upon the proceed-

ings had and evidence heard upon the trial of the case under review, which is outside of the scope of review allowable either by the trial court reviewing its former decree or the Appellate Court or Supreme Court on appeal in such case.

Knaus v. *Chicago Title & Trust Co.*, 265 Ill. 588, 592-3.

Chap. 110, Par. 164 Ill. Practice Act, Bar Association Edition, 1943 (Specifically provides that the penalty of admission does not apply where "the party has had no opportunity to deny").

Rule 8 of the Illinois Supreme Court gives 20 days to answer and such time had not expired.

Piot v. *Davis*, 241 Ill. 434, 439 (Rule where case was heard on pleadings and evidence).

Dempsey v. *Burns*, 281 Ill. 644.

Kelly v. *Kelly*, 285 Ill. 72, 75.

Guerin v. *Guerin*, 270 Ill. 239, 244.

Imperial Fire Insurance Co. v. *Schimmer*, 96 Ill. 580.

VIII.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes "establishes a rule of property and not of procedure only" (Rec. 131).

Potter v. *Couch*, 141 U. S. 296, 312.

Spindle v. *Shreve*, 111 U. S. 542.

Baumgarten v. *Reconstruction Finance Corp.*, 131 F. (2d) 741.

Hummel v. *Cardwell*, 390 Ill. 526 (*the case at bar*).

Dunham v. *Kaufman*, 385 Ill. 79.

Nichols v. *Levy*, 72 U. S. (5 Wall.) 433.

Knight v. *Gregory*, 389 Ill. 554, 561.

Hull v. *Farmers Loan & Trust Co.*, 245 U. S. 312.

Eaton v. *Boston Safe Deposit & Trust Co.*, 240 U. S. 427.

IX.

The interests of the parties in the case at bar are of such a nature that the court of bankruptcy does not have summary jurisdiction and, therefore, the trustee in bankruptcy had his day in court when he filed his plenary suit in the Illinois court.

Cline v. *Kaplan,* 323 U. S. 97.
In re Baudouine, 101 Fed. 574 (2nd Cir. Ct. N. Y. 1900).

X.

Section 70a of the Bankruptcy Act does not define exemptions or property rights. By its express terms no substantive rights or special remedies are created in favor of the trustee in bankruptcy changing the character of the property which, by virtue of the express terms of an Illinois statute (not mere judicial decision regarding the common law), is not available to be taken in payment of a debt by any judicial process.

Hull v. *Farmers L. & T. Co.,* 245 U. S. 312.
Eaton v. *Boston Safe Deposit Co.,* 240 U. S. 427.
Potter v. *Couch,* 141 U. S. 296, 319.
Spindle, Assignee v. *Shreve,* 111 U. S. 542.
Southern Dairies, Inc. v. *Banks,* 92 F. (2d) 282 (certiorari denied 302 U. S. 761).
Steele v. *Buel,* 104 Fed. 968 (Cir. Ct. of App. 8th Circuit 1900).
Holden v. *Stratton,* 198 U. S. 202.
Turner v. *Bovee,* 92 F. (2d) 791, 792.
Lockwood v. *Exchange Bank,* 190 U. S. 294.

SUMMARY OF ARGUMENT.

1. The petitioner by his bill of review sought to attack collaterally, solely on the ground of alleged error of state law, two consent decrees (not subject to be reviewed by a bill of review), which had become *res adjudicata* more than 4 months prior to bankruptcy.

2. Whether the decrees sought to be attacked collaterally were consent decrees was a question of fact, and the finding of the state trial court, confirmed by the state Supreme Court, will not be reviewed by certiorari by this court.

3. Aside from the question of consent decrees, a bona fide agreement made for a valuable consideration respecting a subject matter in regard to which the parties were competent to contract, wherein the parties agreed to settle and compromise their litigation, fully executed more than 4 months prior to bankruptcy, estops both parties to such agreement, and the petitioner claiming through one party, from maintaining his bill of review.

4. A state court decree, which became *res adjudicata* more than 4 months prior to bankruptcy, is not affected by the provisions of Section 70a of the bankruptcy act in case where such decree is sought to be attacked by the petitioner solely on the ground that the court entering the decree committed an alleged error of state law.

5. No question of bankruptcy law was necessarily involved in the decision of the state Supreme Court, which construes the effect of a state statute (Section 49 of Chapter 22 of the Illinois Revised Statutes) making the interest of a beneficiary in a trust created in good faith by another for the support of the beneficiary just as immune from the

claim of creditors as an interest in a so-called typical spendthrift trust.

6. There was no error of law committed by the trial court in entering the decrees sought to be attacked collaterally.

7. No question of any conflict between any Illinois statute and the bankruptcy act, or any question of due process of law, is involved.

8. No question of federal law or any important question of law is here involved.

ARGUMENT.

I.

A. A bill of review does not lie to set aside a consent decree which relates only to private rights between parties competent to contract, who acted with the advice of their respective attorneys in a case where such decree was entered more than four months before bankruptcy and is attacked solely on the ground that the trial court committed an error of law in entering such decree.

B. Consent that the decrees shall stand and be enforced, given by the defendant to the plaintiff for a valuable consideration, within term time, makes the decrees consent decrees, in regard to which under the Illinois law no bill of review will lie.

The petitioner contends that the interest of Dorothea W. Huszagh in the trust estate created by her father's will could be assigned by her and, therefore, her right, if she had any, to attack the consent decrees passed to the petitioner.

Upon the same premise that such interest could be assigned, such interest was a subject matter which both the Illinois trial court (Rec. 66, 98) and the Illinois Supreme Court in its opinion (Rec. 132) properly found was of such a character "that the agreement made between Mrs. Huszagh and Cardwell related to matters in which they were both competent to contract."

Upon the premise that Mrs. Huszagh could have assigned her beneficial interest in the trust estate, Mrs. Huszagh could make a bargain with Cardwell, which she did make, relating to her interest, providing that the decree for the sale of her interest stand and be carried out by a sale at public auction. If at such sale the interest brought

more than the amount due Cardwell on his judgment, the overplus would have been given to Mrs. Huszagh. The fact that at the public sale there was no overplus is immaterial. Cardwell agreed (Rec. 131-132), regardless of what price the interest brought at the master's sale, to satisfy in full his common law judgment entered against Mrs. Huszagh in another case, to pay master's fees, which he did, in the sum of $200.00 and all expenses and costs in the creditor's suit, and agreed to file a satisfaction piece in the common law suit.

In case where the parties are competent to contract respecting the subject matter of their agreement, a defendant who, for a valuable consideration, has agreed to take no steps to attack the validity of the decree, ceases to have the right to do so, and it makes no difference whether the decree is erroneous or even void for want of jurisdiction, because the defendant, nevertheless, is bound by his agreement not to attack its validity. (*Hempstead* v. *Broad,* 275 Ill. 358, 365; *Corwin* v. *Shoup,* 76 Ill. 246; *Bergman* v. *Rhodes,* 334 Ill. 137; *King* v. *King,* 215 Ill. 100.)

Since more than four months elapsed from the time of the entry of the consent decrees sought to be attacked collaterally and the advent of bankruptcy, the decrees sought to be attacked had become *res adjudicata* more than four months prior to bankruptcy. There is no provision in the bankruptcy act which gives the trustee in bankruptcy rights to attack and set aside decrees on the sole ground of a mistake of law which, according to the laws of the State of Illinois, have become *res adjudicata* between the parties more than four months prior to the advent of bankruptcy.

There is no question of fraud involved in this case (Rec. 87). The sole ground upon which the trustee in bankruptcy sought to attack the decrees by his bill of

review was on the ground of mistake of law (Rec. 27; 129), but a consent decree, entered more than four months prior to the advent of bankruptcy, cannot be set aside because of any error of law in entering such decree, either by a party to such decree or by his trustee in bankruptcy. (*Harding* v. *Harding*, 198 U. S. 317, citing *Armstrong* v. *Cooper*, 11 Ill. 540; *Crow* v. *Harrison*, 248 Ill. 462.)

A bill of review does not lie to set aside a consent decree on the ground of an error of law.

Petitioner contends in his petition that the sale held pursuant to the decrees entered in the creditor's bill suit transferred to Cardwell legal title to the beneficial interest of Mrs. Huszagh in the trust estate created by her father's will. The decree of the trial court ordering the sale in the creditor's suit, and the decree of the trial court in that suit approving the sale, the force and effect of the undisputed agreement made between Cardwell and Mrs. Huszagh, and the Master's public sale and assignment were effective for the purpose of transferring to Cardwell the interest of Mrs. Huszagh in the trust estate created by her father's will, because both the bill of review of the trustee in bankruptcy and the counterclaim for review of Mrs. Huszagh were dismissed for want of equity by the decree of the trial court in the bill of review suit, which was affirmed by the judgment of the state Supreme Court.

The transfer of Mrs. Huszagh's interest, however, was fully effectuated through the consent decrees entered ten months before the advent of bankruptcy, and such decrees, by virtue of the agreement between Cardwell and Mrs. Huszagh, were not subject to be set aside by a bill of review after having been entered. However, it appears that the trustee in bankruptcy makes the contention that because "title to Mrs. Huszagh's interest" passed to Cardwell by proceedings had in the creditor's bill suit, there

was a transfer of Mrs. Huszagh's beneficial interest in the trust within the purview of Section 70a(6) of the bankruptcy act relating to "the unlawful taking or detention of or injury to his property." To contend that a valid consent decree entered ten months before bankruptcy is an unlawful taking is a misnomer and begs the question. Such a contention concedes that in the creditor's suit the court had jurisdiction over the parties and the subject matter of its decree, as was found by both the trial court (Rec. 66) and by the state Supreme Court in its opinion (Rec. 132) otherwise there would be no "taking" as the petitioner alleges. The validity of a consent decree was confirmed by the judgment of the state Supreme Court. Its validity depended upon what was the law of the State of Illinois at the time the decrees sought to be attacked were entered and when Mrs. Huszagh made her agreement with Cardwell. At that time there was no bankruptcy, and no question of bankruptcy law was involved. Reviewing such decrees at a later date, more than four months after their entry, does not involve any proper question of bankruptcy law.

The state Supreme Court, construing Section 49 of the Illinois Chancery Act (Chap. 22 of the Illinois Revised Statutes 1945) relied upon by the plaintiff in his bill of review as sole ground for showing that there was an error of law in entering the decree in the creditor's suit, determinined only what was the proper construction of the state statute law at the time the consent decrees were entered. The state Supreme Court, in construing the Illinois statute relied upon, held that upon the facts in the case, as found by the trial court and confirmed by the state Supreme Court, no bill of review would lie. Such a determination of fact and state statute law is not subject to be reviewed by certiorari by this court. Whether such decrees should be set aside by a bill of review was solely a question of state law. If the decrees were subject to be

set aside by a bill of review although they were consent decrees and although Mrs. Huszagh made her agreement with Cardwell, then the Supreme Court would have provided in its judgment that relief be given to either the trustee in bankruptcy on his bill of review or to Mrs. Huszagh, on her counterclaim for review. Its actual decision in the case was that no bill of review would lie at the instance of Mrs. Huszagh or at the instance of the trustee in bankruptcy, and the rationale of the Supreme Court's decision was that the decrees sought to be attacked, being consent decrees, were at no time subject to be set aside by a bill of review on the ground of a mere error of law by Mrs. Huszagh. After the lapse of four months, the trustee in bankruptcy could claim only that the "rights" of Mrs. Huszagh "passed" to him. However, since Mrs. Huszagh had no right to maintain a bill of review, there was no right which "passed" to her trustee in bankruptcy on the advent of bankruptcy, irrespective of the fact whether Mrs. Huszagh's interest would have passed to the trustee in bankruptcy if there had been no creditor's bill proceedings and if there had been no agreement between her and Cardwell. Having decided in the negative the first question as to whether Mrs. Huszagh at any time had a right to maintain a bill of review to set aside a consent decree in the creditor's suit, because of an alleged error at law, the opinion of the Supreme Court of Illinois dealing with the second question, as to whether or not the trustee in bankruptcy would have had a right to maintain a bill of review to set aside the decrees in the creditor's suit if Mrs. Huszagh had not made the agreement she made with Cardwell, was a moot question not necessarily involved in this case and constituted mere dictum. By claiming that Mrs. Huszagh's "right" to maintain a bill of review "passed" to him by virtue of Section 70a(5) or 70a(6) of the bankruptcy act, the petitioner begs the question. He claims that he can set aside consent decrees

because a "right" to set them aside "passed" from a bankrupt by virtue of the bankruptcy act in case where at the advent of bankruptcy and more than four months prior thereto the bankrupt had no right to set aside the consent decrees for alleged error of law. This being the status of the attacked decrees more than four months before bankruptcy, there could not have been an unlawful taking within the meaning of Section 70a(6) of the bankruptcy act by virtue of a decree which was found and adjudicated by the Supreme Court of Illinois, at a time it had jurisdiction over the parties and the subject matter in the bill of review case, to be lawful and not subject to be set aside.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes were enacted as a matter of public policy for the benefit of a beneficiary in a trust estate but have never been construed to hold that in a creditor's bill, with the consent of the beneficiary, such property could not be sold to pay a debt. In the case of *Binns* v. *LaForge,* 191 Ill. 598, the Supreme Court affirmed a decree of the trial court which subjected the interest of a beneficiary in a trust, within the purview of the statute cited, to the payment of a debt, because the beneficiary did not take an appeal. The Illinois Supreme Court would not in the case last cited have affirmed the decree of the trial court if it were of the opinion that the trial court had no jurisdiction to enter the decree it did enter. When the Supreme Court affirms a decree of the trial court, it can no longer be contended that the trial court entering such decree did not have jurisdiction over the parties and the subject matter of its decree.

The trustee in bankruptcy, at various times, and even in his argument in the petition filed in this court, has tried to treat matters in the bill of review case as if he were trying the creditor's bill suit *de novo,* with a right

to interpose defenses on behalf of Mrs. Huszagh or on his own behalf, which were not interposed in the creditor's suit. He has purposely failed to mention in his summary statement of facts or argument the very salient and controlling feature of the state Supreme Court decision to the effect that the decrees sought to be attacked collaterally were consent decrees, and has not enlightened this court as to the controlling fact that Cardwell and Mrs. Huszagh, for a valuable consideration, made and entered into an agreement more than ten months before bankruptcy, wherein Mrs. Huszagh agreed not to litigate further, and, in particular, not to take any appeal or file any bill of review in respect to the decree of sale in the creditor's suit.

Contrary to the rules of this court, the petitioner has adopted the novel and unwarranted expediency of attaching as appendix to his petition, not a copy of the opinion of the Illinois Supreme Court but the second opinion of the Illinois Appellate Court, although his petition herein is not and could not be directed to the judgment of the Appellate Court, reversed, as it was, by the judgment of the Illinois Supreme Court.

II.

Whether the decrees in the creditor's suit sought to be attacked collaterally by a bill of review were consent decrees is a question of fact which will not be reviewed on certiorari by the Supreme Court of the United States.

The Circuit Court of Lake County, Illinois, found and adjudicated (Rec. 66-67) that the decrees sought to be attacked were consent decrees and that, for a valuable consideration, Mrs. Huszagh had agreed with Cardwell that she would not file any bill of review or take any further steps to litigate the validity of the decrees sought to be attacked by the trustee in bankruptcy. The bona fides of

such agreement is not in issue (Rec. 87) but is conceded in this case where the validity of the decrees is sought to be attacked collaterally only on the ground of an error of law (Rec. 27-29; 129). Whether the decrees were consent decrees is a matter of fact, and the finding of the trial court, concurred in by the Supreme Court of Illinois, makes such fact final, because the Supreme Court of the United States does not grant a writ of certiorari for the purpose of inquiring into the weight of the evidence and discussing specific facts. (*Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139.) Furthermore, the evidence in the bill of review case (Rec. 81-89), showing that the decrees were consent decrees is undisputed.

III.

Section 70a of the Bankruptcy Act does not define exemptions or create property rights in derogation of the express terms of the Illinois statute (Section 49 of Chapter 22 of the Illinois Revised Statutes) pertaining to the interest of a beneficiary in a trust estate created in good faith for support of someone other than the beneficiary.

It is the contention of the trustee in bankruptcy that even in the absence of fraud or mistake of fact, he has some special standing and privilege in a plenary bill of review suit in a court of Illinois to attack decrees which became *res adjudicata* more than four months prior to bankruptcy, which the bankrupt would not have if bankruptcy had not intervened. There is no language in Section 70a of the bankruptcy act which could be construed to create such special remedy or discrimination in favor of a trustee in bankruptcy.

The Supreme Court of Illinois was right in holding, as a matter of *obiter dicta* that in a plenary suit a trustee in bankruptcy has no right to take an interest in property which, by virtue of an express statute (Section 49 of

Chapter 22) of the State of Illinois, as construed by not only the Supreme Court of that state but as repeatedly construed by the Supreme Court of the United States, creates a rule of property and renders property of the specific character falling within the purview of the statute immune from claims of all creditors. Property so immune from claims of all creditors would not have passed to the trustee in bankruptcy if there had not been any proceedings in the creditor's bill suit. This holding by the Illinois Supreme Court was not necessary to its decision, which rested solely, as appears from the dismissal of Mrs. Huszagh's counterclaim for review, upon the ground that the decrees were consent decrees entered more than four months prior to bankruptcy.

The dictum of the Supreme Court to the effect that the trustee in bankruptcy had no right to recover and administer as a part of the assets of the bankrupt's estate any portion of the principal or income from the trust estate created by the last will of Mrs. Huszagh's father, was not the basis of its judgment.

However, the dictum of the Illinois Supreme Court was based upon its own construction of Section 49 of Chapter 22 of the Illinois Revised Statutes, which must be regarded as if it were read into every trust made since the passage of that statute in 1845. Such statute gives a particular character to the interest of a beneficiary in a trust estate, that is within the purview of Section 49 of Chapter 22 of the Illinois Revised Statutes, also known as Section 49 of the Illinois Chancery Act, and creates a rule of property. (*Potter* v. *Couch*, 141 U. S. 296, 312.) Such interest is as immune from the beneficiary's debts as is an interest in a typical spendthrift trust.

In the case of *Steib* v. *Whitehead*, 111 Ill. 247, where the interest of a beneficiary in a typical spendthrift trust was involved, the Supreme Court of Illinois held that funds

in the hands of the trustee could not be attached by creditors.

In the case of *Knight* v. *Gregory,* 389 Ill. 554, at page 561 of its opinion, the Illinois Supreme Court stated:

> "In view of section 49 of the Chancery Act, however, all active trusts, which otherwise qualify, come under the doctrine of *Steib* v. *Whitehead,* 111 Ill. 247. With these authorities and others of a similar nature cited by appellants we agree. These authorities are, however, concerned only with an interpretation of the rights of creditors seeking redress against funds in the hands of a trustee under either a spendthrift trust or an active trust qualifying under Section 49 of the Chancery Act."

In *Potter* v. *Couch,* 141 U. S. 296, at page 320 of its opinion, the Supreme Court of the United States in speaking of the Illinois statute stated:

> "the spirit of the statute alike require that this equitable interest should not be charged for his debts."

and that the Illinois statute

> "establishes a rule of property, and not of procedure only."

In *Eaton, Trustee in Bankruptcy* v. *Boston Safe Deposit and Trust Company,* 240 U. S. 427, the court had under consideration a trust established by a will, in which will it was provided that the income shall be free from interference of creditors. In Illinois, Section 49 of Chapter 22 of the Illinois Revised Statutes, had been in force and effect in its present form since the year 1845, and it has repeatedly been construed as creating a rule of property. Every will creating a trust, bona fidely created by one person for the benefit of another, must be read to the same extent and in like manner as if specific reference to the statute mentioned had been made in the will. With this fact in mind, the case at bar, as far as the contentions of the

petitioner are concerned, is similar to the case of *Eaton, Trustee in Bankruptcy* v. *Boston Safe Deposit and Trust Company,* 240 U. S. 427, in which the Supreme Court stated in its opinion:

> "The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it."

Since the petitioner contends that he was entitled to maintain his bill of review only because of the force and effect of Section 49 of Chapter 22 of the Illinois Revised Statutes, he must be bound by the construction placed on that statute by the Supreme Court of Illinois. The United States Supreme Court will follow the decisions of the Illinois Supreme Court construing an Illinois statute. In the case of *Page* v. *Edmunds,* 187 U. S. 596, at page 602, the United States Supreme Court stated:

> "If those decisions are interpretations of the state statute, we must yield to their authority."

No question of any conflict between any Illinois statute and the bankruptcy act, or any question of due process of law, is involved. No question of federal law or any important question of law is here involved.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this is not a proper case for review by certiorari and that the petition for such writ should be denied.

Respectfully submitted,

DWIGHT S. BOBB,
Attorney for the Respondent,
James R. Cardwell.

OSCAR S. SEAVER,
Of Counsel.

APPENDIX.

OPINION OF THE SUPREME COURT.

Appeals from the Appellate Court for the Second District;—heard in that court on appeal from the circuit court of Lake county; the Hon. Ralph J. Dady, Judge, presiding.

Edward G. Berglund, of Chicago, for appellant Dorothea W. Huszagh; Oscar S. Seaver, of Chicago, for appellant James R. Cardwell; Barre Blumenthal, of Chicago for appellant Fred J. Wegg, trustee; Sidney H. Block, of Waukegan, for appellee.

MR. CHIEF JUSTICE FULTON DELIVERED THE OPINION OF THE COURT:

On November 15, 1940, Fred E. Hummel, as trustee in bankruptcy of the estate of Dorothea W. Huszagh, filed his bill of review in the circuit court of Lake county, seeking to vacate and set aside two decrees entered in that court, namely, a decree of sale entered November 17, 1939, and a decree approving the master's report of sale entered on December 15, 1939, both in a creditor's suit commenced by James R. Cardwell against Dorothea W. Huszagh and Fred J. Wegg, trustee. The defendants to the complaint were James R. Cardwell, Dorothea W. Huszagh and Fred J. Wegg, as the sole trustee under the will of Frederick H. Wickett, deceased. All of the defendants filed answers and Dorothea W. Huszagh filed a counterclaim.

On a hearing in the circuit court, the chancellor dismissed both the complaint and the counterclaim as being

without equity. From this decree Hummel appealed to the Appellate Court for the Second District and all of the defendants filed cross appeals, resulting in a variety of contentions, all earnestly urged by the different parties to the suit.

The Appellate Court reversed the action of the trial court in dismissing, for want of equity, the bill of review filed by the trustee in bankruptcy, and affirmed that portion of the decree of the circuit court which dismissed, for want of equity, the counterclaim for review filed by Dorothea W. Huszagh. It further remanded the cause to the Lake county circuit court with directions to vacate and set aside its decree of sale entered November 17, 1939, and also the decree of December 15, 1939, approving the report of sale, and to restore Dorothea W. Huszagh to her former status and condition under her father's will as though the former decrees had not been rendered. Separate petitions for leave to appeal were filed by the defendants and allowed, and, by order of court, the appeals have been consolidated. All of the above-named defendants to the bill of review appear as appellants in this court.

The will of Frederick H. Wickett, after providing for the payment of his debts, and making minor specific bequests, devised and bequeathed to Fred J. Wegg (and Norman M. Hancock, who refused to act,) his entire estate, in trust, for the uses and purposes set forth in the will. Fred J. Wegg qualified and assumed the trust imposed in him by said will, and, as such trustee, he was given full power to manage and control all of the residuary estate. The title to said estate vested in said trustee with ample authority and discretion to sell and dispose of the property as he deemed best, the proceeds of such sales, however, to become a part of the trust estate and subject to the terms of the trust. The tenth clause of the will directed the trustees to pay, out of the trust estate, the sum of $1500

per month to the wife, Alice W. Wickett, during her lifetime, and such other sums as she might, in the judgment of the trustees, deem fit for her needs and requirements. Alice W. Wickett, the widow of the testator, renounced the provisions of the will for her benefit.

The eleventh clause of the will reads as follows: "Upon the death of my said wife, my said trustees are directed to pay the net annual income of my said trust estate, in such installments as in their judgment shall seem best, equally to my children, Dorothy Huszagh and Marjorie Huszagh, share and share alike. My said trustees are, however, expressly authorized and empowered to pay over and deliver to my said children, Dorothy Huszagh and Marjorie Huszagh, from time to time, as in their judgment shall seem fit, such further or other portion of the corpus of this trust estate; Provided, however, that at all times both my said children shall be treated equally, so far as the division of said trust estate is concerned."

By the thirteenth clause of the will, the trust period was to continue for twenty years after the death of his wife.

The fifteenth clause of the will is as follows: "I hereby expressly authorize and empower my trustees from time to time to pay any part of the corpus of this trust estate to any of my relatives if, in the opinion of my said trustees, they may be in want or need of assistance."

By reason of the renunciation on the part of the widow, the legal title and possession of that part of the estate relinquished by her, with other residuary assets of the estate, passed to the trustee, Wegg, as part of the trust estate. *Dunshee* v. *Dunshee,* 251 Ill. 405; *Sueske* v. *Schofield,* 376 Ill. 431.

In October, 1939, the appellant James R. Cardwell, having obtained, on August 3, 1939, a judgment against

Dorothea W. Huszagh, filed a complaint in the nature of a creditor's bill in the circuit court of Lake county against Mrs. Huszagh and Wegg, as trustee, and sought to reach the interest which Mrs. Huszagh had in the trust created by the will of her father. Both Wegg, as trustee, and Dorothea W. Huszagh filed answers denying that the interest of the latter in said trust was subject to sale for the benefit of the creditor, and maintaining that the trust was in the nature of a spendthrift trust. On a hearing in the creditor's suit, the circuit court of Lake county held that the interest of Dorothea W. Huszagh in the said trust estate constituted personal property of an equitable nature and did not create a trust in the nature of a spendthrift trust and that such interest was subject to equitable attachment and sale in that proceeding for the purpose of satisfying, in whole or in part, the unpaid judgment in favor of Cardwell. A decree of sale in said cause was entered On November 17, 1939, and a sale was held by the master in chancery at which Cardwell became the purchaser of the interest of Dorothea W. Huszagh. The sale was approved and confirmed in the circuit court by decree dated December 15, 1939.

Dorothea Huszagh had also been a defendant in a foreclosure proceeding in the city of Chicago, where a decree of sale was entered on June 30, 1939. Pursuant to this decree, a sale was made resulting in a deficiency decree against Dorothea Huszagh in the sum of $533,394.13. On August 20, 1940, she filed voluntary bankruptcy proceedings, and the appellee herein was appointed trustee in bankruptcy on October 24, 1940. On November 15 thereafter, he filed his complaint for review.

In his complaint the trustee in bankruptcy contends that the circuit court did not have jurisdiction to enter the decree of sale in the creditor's suit disposing of the interest of Dorothea W. Huszagh in the trust because it

is governed by section 49 of the Chancery Act. (Ill. Rev. Stat. 1943, chap. 22, par. 49.) The provision reads as follows: "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a complaint against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not; * * *."

The claim of Cardwell, as the judgment creditor and as the purchaser of Dorothea W. Huszagh's interest in the trust at the sale, necessarily rests upon the validity of the decree entered November 17, 1939. He insists that the circuit court had jurisdiction of the parties and of the subject matter of the trust; that, on the hearing, testimony was taken in open court; that the court determined the trust was not a spendthrift trust, and that no appeal was taken from that decree; also, that within seven days after the decree of sale was entered, Dorothea W. Huszagh, for a valuable consideration, agreed she would not take any action by way of appeal or review or question

the decrees taken in the creditor's suit. He appeals from the action of the Appellate Court wherein it reversed the decree of the trial court in dismissing the bill of review for want of equity.

Dorothea W. Huszagh maintains that the trust created in her father's will is a spendthrift trust; seeks to reverse the judgment of the Appellate Court and insists that the portion of the decree of the trial court dismissing Hummel's bill of review for want of equity should be affirmed; also that the portion of said decree in the trial court dismissing her counterclaim for review should be reversed with direction to grant the prayer contained in the said counterclaim.

Fred J. Wegg, the trustee under the will, asks that the accounting between himself and Dorothea W. Huszagh, as determined by the decree of the circuit court of Lake county in the creditor's suit, under date of November 17, 1939, be confirmed.

Fred E. Hummel, the trustee in bankruptcy and appellee in this court, urges that the judgment of the Appellate Court be affirmed, with directions to the trial court for the entry of a decree and the terms thereof.

With the great diversity of contentions made by the various interests in this cause, it will be difficult to discuss in detail each and all of the questions raised in the briefs.

At the outset, we are confronted with the problem of whether or not the trustee in bankruptcy has such an interest in Mrs. Huszagh's interest in the trust estate as entitles him to maintain his bill of review in this cause.

As above expressed, it is his contention that the order or decree of sale entered by the circuit court of Lake county in the creditor's suit on November 17, 1939, was void because beyond the jurisdiction of the court. His bill of review is based upon the theory that there was

"error apparent" upon the face of the record in that case. Specifically, he maintains that the court had no power to order a sale of Dorothea W. Huszagh's interest in the trust estate because it was in contravention of the exception contained in section 49 of the Chancery Act above quoted.

The record in the case indicates that the creditor's suit in the trial court was determined on the question of whether or not the will of Frederick H. Wickett created a spendthrift trust with Dorothea W. Huszagh as a beneficiary. The chancellor found that her interest in the trust was not in the nature of a spendthrift trust, but there was no express finding as to whether her interest was protected by said section 49. We agree with the statement of the trustee in bankruptcy that the interest of Dorothea W. Huszagh in the trust was not an estate on which a judgment at law would be a lien. We do not believe such interest could be reached by a creditor's bill or that, through a creditor's bill, a creditor could acquire any lien. The trust created in the will may well be described as an active trust and comes squarely under the provisions of the exception in said section 49. The legal title to the assets of said trust became vested in Fred J. Wegg, as trustee under the will. The funds in the trust came directly from the estate of Frederick H. Wickett, and, so far as the record discloses, it was created in good faith and expressly for the purpose of protecting the income. *Potter* v. *Couch*, 141 U. S. 296.

We agree further with the statement of appellee that one of the essentials of a valid judgment is that the court have jurisdiction to render that particular judgment. (*Armstrong* v. *Obucino*, 300 Ill. 140; *People ex rel. Carlstrom* v. *Shurtleff*, 355 Ill. 210; *Thayer* v. *Village of Downers Grove*, 369 Ill. 334.) However, we cannot see that the trustee in bankruptcy is in any better position to

reach Mrs. Huszagh's interest in the trust than was Cardwell, the plaintiff in the creditor's suit. The office of trustee in bankruptcy is created by the Bankruptcy Act, and his powers and the remedies he is authorized to pursue in a plenary suit are defined in such act. The appellee relies upon subsection 5 of section 70A of the Bankruptcy Act for his power and authority to reach the trust estate in this action. The said clause vests the trustee, by operation of law, with the title of the bankrupt, except insofar as it is to property which is held to be exempt, to "property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered." Under this section, we believe the rights of the trustee in bankruptcy relate only to property which passes to him without the necessity of bringing a plenary suit to recover. It refers to property which was in the possession or control of the bankrupt at the date of the bankruptcy. In section 70C of the same act, with reference to all other property, the trustee in bankruptcy is vested with all the rights, remedies and powers of a judgment creditor, and no more.

If the protection of section 49 of the Chancery Act makes the interest of Dorothea W. Huszagh in the trust immune from any suit or lien by a creditor, surely a trustee in bankruptcy representing a creditor can have no greater or superior right. In the matter of exemptions and the interpretations of property rights, the bankruptcy courts have always regarded decisions of the State courts as controlling. (*Erie* v. *Tompkins,* 304 U. S. 64.) In *Johnston* v. *Herrin,* 383 Ill. 598, we held that a contingent interest of a bankrupt is not property which the trustee in bankruptcy can recover in a plenary suit.

The trustee in bankruptcy contends that the amendment to the Bankruptcy Act in 1938 shows that property,

even though it may not be subject to seizure, may pass to the trustee if it is transferable. With the exception given to exempt property in section 70A of the act and the power to acquire property through a plenary suit limited to those of a judgment creditor in section 70C, we do not construe the act to give a trustee in bankruptcy in plenary suits greater remedies in a State suit than those afforded a judgment creditor. Any other rule would be contrary to the plain language of section 70C and permit a trustee to take property which, under the laws of Illinois, could not be taken by any other plaintiff for the payment of a debt. In *Dunham* v. *Kauffman*, 385 Ill. 79, we held that the interest of a beneficiary in a trust could not be reached by attachment. In *Baumgarden* v. *Reconstruction Finance Corp.*, 131 Fed. 2d 741, the Circuit Court of Appeals held that a trust fund which came squarely under the exception in section 49 of the Chancery Act could not be reached by garnishment. It is clear, from the holdings of this court and that of other jurisdictions, that section 49 of the Chancery Act creates a rule of property and does not relate solely to procedure. (*Potter* v. *Couch*, 141 U. S. 296.) The Appellate Court erred in holding that the trustee in bankruptcy had a right to challenge the validity of the sale of the truste estate. The trial court correctly ruled that the bill of review filed by the trustee in bankruptcy should be dismissed for want of equity.

Neither do we believe that Dorothea W. Huszagh is entitled to maintain her present counterclaim or to obtain any relief thereunder. The trial court was in error when it entered the decree of sale on November 17, 1939, in the creditor's suit ordering the interest of Mrs. Huszagh in the trust estate to be sold to satisfy the Cardwell judgment upon which the creditor's suit was based. However, that decree recited that, on the testimony taken in open court and the argument of counsel for the respective parties, it had jurisdiction over all parties in the cause and

the subject matter of the decree. The circuit court of Lake county, sitting as a court of equity, had full power to pass upon all questions arising on the pleadings in the creditor's suit. No action by way of review or appeal was taken from that decree and the testimony was not preserved. Within seven days after the entry thereof, the attorney for Mrs. Huszagh approached counsel for Cardwell and asked him if his client would bid the full amount of his judgment upon which the creditor's bill was predicated, so that there would be no deficiency unsatisfied against Mrs. Huszagh. After a complete conversation, the attorney for Cardwell agreed that he would, on behalf of his client, satisfy the entire judgment if Mrs. Huszagh would agree not to litigate the case further. The proposition was submitted to Mrs. Huszagh and she approved the same and authorized her attorney to enter into such agreement. Pursuant to such arrangement, Cardwell was the successful bidder at the sale. He paid all of the costs, including the master's fees. He prepared a satisfaction piece which was approved by Mrs. Huszagh's attorney and filed in the cause. Both Mrs. Huszagh and her attorney testified to the facts above related in the bill of review hearing and the said agreement was fully executed. Mrs. Huszagh accepted the benefits of this agreement which was executed more than four months before she filed her petition in bankruptcy. Cardwell cannot now be placed *in statu quo* and we believe that Dorothea W. Huszagh is precluded and estopped from obtaining any relief under her counterclaim or from relitigating any of the questions determined in the creditor's suit. The trial court had full jurisdiction to pass upon all of the questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a spendthrift trust. Dorothea W. Huszagh is now estopped from litigating those questions again in the bill of review case.

It appears clear to this court that the agreement made between Mrs. Huszagh and Cardwell related to matters in which they were both competent to contract, and resulted in the decrees, entered by the trial court in the creditor's suit, becoming consent decrees. (*King* v. *King*, 215 Ill. 100; *Bergman* v. *Rhodes*, 334 Ill. 137.) Both the trial court and the Appellate Court correctly held that the counterclaim of Dorothea Huszagh should be dismissed.

Because of the view we take of the questions above discussed, it is not necessary to pass further upon the appeal of Fred J. Wegg, trustee. That part of the judgment of the Appellate Court affirming the decree dismissing the counterclaim of Dorothea W. Huszagh is affirmed. The part of the judgment reversing the trial court's decree dismissing the bill of review is reversed.

Appellate Court affirmed in part and reversed in part; circuit court affirmed.

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FILED
MAR 21 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. 823, 824, 825.

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF DOROTHEA W. HUSZAGH,
Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH AND FRED J. WEGG AS THE SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED,
Respondents.

REPLY OF PETITIONER.

SIDNEY H. BLOCK,
4 S. Genesee Street,
Waukegan, Illinois,
Attorney for Petitioner.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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REPLY OF PETITIONER.

A simple prefatory restatement will help this Reply dispel confused reasoning rampant in Respondents' Answers: the proceedings brought by the Trustee in Bankruptcy, seek, by a Bill of Review, to have declared void a decree entered in creditor's bill proceedings brought by Cardwell, a judgment creditor of the bankrupt. The ultimate question is whether that decree in the Cardwell creditor's bill proceedings should be set aside as void. The Trustee in Bankruptcy, Petitioner here, is not seeking to seize this trust by means of a creditor's bill. He is not plaintiff in any creditor's bill proceedings.

I.

Those Portions of the Decision Below Which Are Based Upon Questions of Fact and of State Law Have No Application to the Bill of Review of This Petitioner. The Decision as to This Petitioner Was Based Entirely on the State Court's Erroneous Interpretation of the Federal Bankruptcy Act.

The chief defense offered by respondents is that the Illinois Supreme Court decided a question of *fact*, to which it applied a *state* rule of law. They contend the *facts* established a consent decree, which under the *state* law doctrine of estoppel could not be set aside on collateral attack.

All of the above is true, *but only as to the counterclaim of Dorothea W. Huszagh.* It is not true as to the Bill of Review of the Trustee in Bankruptcy, for as to him, the decision of the Illinois Supreme Court was adverse to his Bill of Review solely because of the interpretation placed by the State Court upon the Bankruptcy Act.

It is peculiar, we admit, for a decision to differentiate between two parties, each ostensibly seeking to attack collaterally the same decree, but that is the undeniable fact here. The reason is simple: the Bill of Review of the Trustee in Bankruptcy was one collateral attack; the counterclaim of the Bankrupt was a *different* collateral attack.

The Huszagh collateral attack (by counterclaim) questioned non-jurisdictional errors in the attacked decree, and such non-jurisdictional errors could be, and the court below held were on the facts, waived by consent of the parties.

The Hummel collateral attack (by Bill of Review) raised

the question of the jurisdiction of the very subject matter, and such lack of jurisdiction of the subject matter can not be waived by consent of the parties. The issues of fact of consent, and of state law estoppel, were therefore, immaterial to, and were in fact not even discussed in the portion of the decision which rules against the Bill of Review of Hummel.

The Bankrupt could have attacked the original creditor's bill proceedings on the same grounds as did her Trustee. But she never did. Her case throughout, and again in this Court, is contrary to, and never in agreement with, the case of her Trustee. It is not debated she could file such proceedings as her counsel thought best. But let us recognize the different cases, the different issues, and not seek to prevent this Court's ruling on the case presented by the Trustee in Bankruptcy, by urging there was no Federal question involved. That is true only as to the separate and wholly dissimilar counterclaim of Dorothea W. Huszagh—*a different suit.*

The collateral attack of the Trustee in Bankruptcy went to the very jurisdiction of the court to render the attacked decree: since the statute on Creditor's Bills in Illinois said a decree could not be entered selling a trust such as this, the court in the Creditor's Bill suit did not have jurisdiction to enter the particular judgment ordering sale that it did enter. With this the Supreme Court of Illinois agreed, saying (R. 130):

> "We agree with the statement of the trustee in bankruptcy that the interest of Dorothea W. Huszagh in the trust was not an estate on which a judgment at law would be a lien. We do not believe such interest could be reached by a creditor's bill, or that a creditor could acquire any lien. The trust created in the will may well be described as an active trust and comes squarely under the provisions of the exception in said

> section 49 * * * We agree further with the statement of appellee (trustee in bankruptcy) that one of the essentials of a valid judgment is that the court have jurisdiction to render that particular judgment. (*Armstrong* v. *Obucino,* 300 Ill. 140; *People ex rel. Carlstrom* v. *Shurtleff,* 355 Ill. 210; *Thayer* v. *Village of Downers Grove,* 369 Ill. 334.)"

It is unquestioned in Illinois that where a court does not have jurisdiction of the subject matter to enter a particular judgment, consent of parties cannot give jurisdiction, nor can estoppel from their actions be a defense. In the *Thayer* case, cited just above in the quoted portion of the Illinois Courts' decision here, the court said:

> "Where the court entering the judgment has exceeded its jurisdiction and such judgment or decree transcends the statute conferring jurisdiction on the court, such judgment or decree is void. * * * It is a rule well established that a void judgment or decree may be vacated at any time and the doctrines of laches and estoppel do not apply."

In *Mansfield* v. *Mansfield,* 203 Ill. 92, 98 the obvious is stated: "consent can never give jurisdiction of the subject matter." Treating the agreement of Huszagh and Cardwell as a waiver of errors, such waiver is of no effect where "the trial court lacked jurisdiction to enter the order." (*Toman* v. *Park Castles Bldg. Corp.,* 375 Ill. 293.'

The opinion below does not mention "consent" and "estoppel" in passing on the collateral attack made by Hummel. Respondents *read into* the decision what does not exist. They say Hummel was really defeated by state questions of fact of agreement; and of resulting estoppel or waiver, although presuming such a basis of decision against Hummel not only contradicts the record, but also assumes that the Illinois court held in this case that the doctrine of

estoppel applies to cure a jurisdictional defect. Such an assumption is intolerable in view of the fact that in agreeing with the Trustee's contention that the court did not have jurisdiction the court cited *Thayer* v. *Village of Downers Grove,* 369 Ill. 334, which says that where jurisdiction is lacking the doctrine of estoppel does not apply.

The decision below actually considers the facts as to consent and the legal effect of "consent" and "estoppel" to the issues on the non-jurisdictional collateral attack of Mrs. Huszagh.

The attack made by Dorothea W. Huszagh in her counterclaim is summarized here in her Brief, at page 7:

> "The cross-complaint for review of Mrs. Huszagh, seeking to set aside the decrees in the creditor's bill suit, was predicated (Rec. 43) upon the theory that her interest in the active trust estate created by the last will of her late father for her support and benefit was a spendthrift trust, and being a spendthrift trust Mrs. Huszagh could make no agreement relating to her interest which would operate as a transfer of her interest to Cardwell."

The Supreme Court of Illinois analyzed her counterclaim as follows:

> "Dorothea W. Huszagh maintains that the trust created in her father's will is a spendthrift trust; * * *"

The power of a Chancery Court to construe a will, and decide whether it created a spendthrift trust, is not, in Illinois, restricted by statute. A decision that a trust is not a spendthrift trust contravenes no jurisdictional statute. That question of whether this was or was not a spendthrift trust was specifically raised in the pleadings in the original creditor's bill, and as the Supreme Court of Illinois said as to that question:

> "The circuit court of Lake county, sitting as a court of equity, had full power to pass upon all questions arising on the pleadings in the creditor's suit

> • • • The trial court had full jurisdiction to pass upon all of the questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett *created a spendthrift trust. Dorothea W. Huszagh* is now estopped from litigating *those questions* again in the bill of review case." (Italics ours.)

Where the question is non-jurisdictional, inquiry into the actions of the parties is proper. If those actions amount to consent, waiver or estoppel, a collateral attack may properly be barred. The Illinois Court, in passing on the counterclaim of Dorothea W. Huszagh, did bar her on those questions of fact and of state law.

Respondents' insistence that if the bankrupt is barred, her Trustee is barred, forgets that the bankrupt was barred on the issues she raised in her suit: those issues were foredoomed to failure. Had she raised the issues her trustee in his capacity raised, then, and only then, would they equally stand or fall. It is like several counts in a complaint: some may fail, while others not susceptible to the same defenses are sustained. The question under this point is not whether Mrs. Huszagh and her Trustee have equally lost, it is whether they lost for the same reasons. Petitioner contends the fact is that the decision below did not apply those state questions to Petitioner's Bill of Review. The attempt of Respondents' Answers to change these facts is seriously a disservice to this Court. Anticipating these tactics (and not through error) Petitioner printed the Appellate Court opinion as an Appendix so this Court could see that both the Appellate and Supreme Court agreed that the consent and estoppel questions applied only to the counterclaim, not to the Bill of Review.

An analysis of the Illinois decision in this case, published in the Illinois Bar Association Journal for February 1946, is attached hereto as an Appendix. The

analysis in that learned and impartial law magazine is clearly that the Illinois Court decided the Bill of Review of the Trustee solely on the Federal question. The authors say:

> "However, it would appear that the basis of the decision *is in fact the court's interpretation of the Bankruptcy Act* to the effect that where a judgment creditor is denied the right of satisfaction of execution on property held in trust for the bankrupt or, in other words, where such property is not subject to levy and sale under judicial process, it does not pass to the trustee in bankruptcy, no consideration being given to whether the property was or was not subject to voluntary alienation by the bankrupt. This view is not supported by either the terms of the Bankruptcy Act or the cases in question."

II.

The Question of This Trustee in Bankruptcy's Title Was Decided Below Not on an Interpretation of a State Statute, But on an Interpretation of the Federal Bankruptcy Act, So a Clear Federal Question Was Involved.

Respondents argue the decision against the Trustee in Bankruptcy can be said to be no more than a state court decision construing Section 49 of the Illinois Chancery Act. But the real point is: the Illinois court *construed the Bankruptcy Act* as limiting a Trustee's rights to those of a judgment creditor. Only by so construing the Bankruptcy Act, only by lowering the level of a trustee in Bankruptcy's rights to those of a judgment creditor, did the Illinois Supreme Court even have occasion to discuss a judgment creditor's rights under Section 49 of the Illinois Chancery Act. If the Illinois Court had recognized the rights of the Trustee to property which by its nature is assignable (Section 70 (a) 5) the question of a judgment

creditor's rights under Section 49 to bring a creditor's bill in equity to satisfy a judgment would never have arisen.

As pointed out in our Petition (p. 14) Section 49 does not prohibit assignment, and this trust is assignable. All of Respondent's Answers admit it is assignable. Only by refusing to recognize the Trustee's title to that which is assignable did the Illinois Court defeat this Petitioner.

It should be also remembered, the Trustee in Bankruptcy has no intention of ever filing a Creditor's Bill. Mrs. Huszagh's interest in this trust is scheduled in Bankruptcy. A claim for its exemption is pending. An action to "quiet title" in the Trustee would not be a Creditor's Bill, seeking a judgment (contrary to Section 49) that the trust be offered at public venue by a Master in Chancery for sale to the public. Such a plenary suit in no way would involve the statute on practice on Creditor's Bills in Illinois. Here might be noted the repeated misstatements of respondents that Section 49 of the Chancery Act prohibits any method of reaching a trust. Section 49 is expressly limited to Creditor's Bills, and the practice thereon. The common law rule as to creditor's bills always was that no jurisdiction existed in equity to entertain a creditor's bill to reach a trust which was not set up by the debtor himself. (*Hardenburgh* v. *Blair,* 30 N. J. Equity 645 contains a learned study.) Section 49 of the Illinois Chancery Act was passed solely for the purpose of "giving effect to the common law" the Illinois Supreme Court said in *Knight* v. *Gregory,* 389 Ill. 554, 60 N. E. (2d) 399, 401.

The Trustee brought a special and a limited action to knock out for invalidity a sale made contrary to a statute. He was defeated because the Illinois Court construed the Bankruptcy Act as giving only the rights of a judgment creditor. That is the only reason Section 49 of the Chan-

cery Act (which relates to an action by a judgment creditor) could even be thought to apply to this Petitioner. Whether Section 49 ever would apply to Petitioner should logically await filing of a creditor's bill by Petitioner, a thing he has never contemplated doing.

The decision sought to be reviewed is entirely based on a wrong interpretation of the Federal Bankruptcy Act. It is a Federal question of moment suitable for settlement by this Court.

III.

Section 49 of Chapter 22 (Chancery) Illinois Statutes Does Not Protect This Trust From a Trustee in Bankruptcy.

Respondents argue Section 49 of the Illinois Chancery Act makes this trust interest "immune" from a Trustee in Bankruptcy. Huszagh's counsel, especially, says contradictorily that the Illinois Supreme Court in this case said it was "immune" (pages 17, 18) and then admits at page 20 that "the question of the immunity of Mrs. Huszagh's interest was not before the state Supreme Court for its determination. * * *"

It could only be "immune" from the trustee in bankruptcy for one of these two reasons:

1. It is exempt property; or
2. There is no method by which the trustee can reach it.

It is not "exempt" by state law, because there has been a construction of this state statute by the Illinois Supreme Court itself, as recently as March 21, 1945, in *Knight* v. *Gregory,* 389 Ill. 554, 60 N. E. (2d) 399, 401, where the court expressly held:

> "Section 49 of the Chancery Act, in our opinion, is not an exemption statute."

That leaves only the second "immunity": there is no method by which the trustee can reach the property. That highlights and underscores exactly what the Illinois Supreme Court did here: it considered the Bankruptcy Act, and conceded that:

> "The office of trustee in bankruptcy is created by the Bankruptcy Act, and *his powers and the remedies he is authorized to pursue* in a plenary suit are defined *in such act.* (Italics ours.)

Then the Illinois Court considered the Bankruptcy Act, and ruled that Section 70(c) of the Act diminished the title taken by 70(a)(5) of the Act, and that:

> "* * * the trustee in bankruptcy is vested with all the rights, remedies and powers of a judgment creditor, and no more."

The Illinois Court then held that if a judgment creditor brought a creditor's bill, he would be defeated by Section 49 of the Chancery Act, and therefore, so would a Trustee in Bankruptcy *if he brought a creditor's bill.* How completely the Illinois Court misconstrued the Bankruptcy Act is obvious from the fact it could not conceive the Bankruptcy Act as allowing a Trustee in Bankruptcy any remedies except those available to a state judgment creditor. That stresses the gist of this Petition: a precedent is set which lowers to the level of a judgment creditor's rights the entire administration of bankruptcy.

The Illinois Court holds a trustee can succeed only if the property was liable to seizure, in spite of the plain language of Section 70(a)(5) that a trustee can take:

> "property * * * which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered."

It is respectfully submitted therefore, that the Illinois

Court reached its decision of "immunity" only by holding there was no way the Trustee could reach this property; that his remedies to reach the property were conceded to be as set out in the Bankruptcy Act; that the decision that there was no remedy by which he could reach the property was necessarily arrived at by construction of the Bankruptcy Act; and this is the Federal question which is the heart of this Petition for Certiorari.

We believe the decision on the merits of the Federal Question wrong, and of sufficient importance for review, because if the Illinois Court is right, then not only as to trusts, but as to all property, we may properly ask why have bankruptcy administration at all, since just as much can be accomplished in state court proceedings by a judgment creditor?

It is noteworthy that every respondent avoids a defense of the Illinois Court's construction of the Bankruptcy Act, by saying it was merely "dicta." Unbiased legal opinion, however, believes the Federal Question to be the heart of the decision against this Petitioner, and that it was wrong to the extent of wholly upsetting those rules upon which, heretofore, the administration of the bankruptcy law has been based. (See comment on this case in Illinois State Bar Association Journal, February, 1946, printed as an Appendix hereto.)

IV.

The Running of Four Months Between the Judicial Sale and Filing of Bankruptcy Is Immaterial on This Petition.

Respondents state that Mrs. Huszagh had transferred her rights more than four months prior to bankruptcy. If so, she did it only by the mechanics of the decree, and sale

at public vendue by the Master in Chancery, in the Cardwell creditor's bill proceedings. If that judicial act is void when attacked by the Trustee's Bill of Review, there was in fact no transfer "four months", or any time, prior to bankruptcy. She went into bankruptcy with that asset, if the judicial seizure was void. We contend the creditor's bill was wholly ineffective as a valid transfer, when attacked on the grounds raised by the Trustee. The Illinois Supreme Court agrees, saying:

> "We agree with the statement of the trustee in bankruptcy that the interest of Dorothea W. Huszagh in the trust was not an estate on which a judgment at law would be a lien. We do not believe that such interest could be reached by a creditor's bill or that, through a creditor's bill, a creditor could acquire any lien."

In a similar case, this Court held in *Potter* v. *Couch,* 141 U. S. 296, 320, that the prior seizure "did not give any lien or title to his creditors."

Freeman on Judgments, Section 322, says that a void judgment

> "has been characterized as a dead limb upon the judicial tree, which may be chopped off at any time, capable of bearing no fruit to plaintiff. * * *"

It is submitted that if the Cardwell decree contravenes the statute (as the Illinois Court holds here) it cannot be said to have been effectual to make a transfer "four months" before bankruptcy. On this Petition, we may therefore disregard any consideration of the "four months" rule.

Conclusion.

The Illinois court had before it a Bill of Review. The Bill collaterally attacked a prior seizure of bankrupt's property. Should the attack stand, or fall, was the question. The Illinois Courts conceded the decree attacked was void. Why shouldn't it fall? Because the Bankruptcy Act only gives the Trustee in Bankruptcy a judgment creditor's rights, the Illinois Court said.

Glaring from that conclusion of the Illinois Court are three points which, we respectfully submit, show the propriety and wisdom of granting certiorari here:

1. The decision is based on a construction of the rights, powers and remedies of the Trustee in Bankruptcy under the Bankruptcy Act.
2. The Bankruptcy Act has been erroneously construed.
3. A construction of the sections relating to the Trustee's rights, powers and remedies over the bankrupt's property, which reduces him to the status of a judgment creditor, the status he occupied prior to the intentional statutory change in the Act of 1898, unsettles entirely the bankruptcy administration in this country.

The precedent of the Illinois Court, if allowed to go unchallenged by this court once the opportunity to review is thus presented, will surely be followed. If followed, bankruptcy administration will be reduced to a feeble arm of the strength, in varying states, equal to the strength of judgment creditor's rights in the various states. A bankrupt corporation having identical (and of course non-exempt) assets in various states will find those assets come within bankruptcy administration from some states, but not from others where a judgment creditor's rights differ. This shrinks the scope of what Congress has said *shall be ad-*

ministered, without regard to whether it can by state law be seized or not. More important, it violates the Constitutional requirement (Article I, Sec. 8) that Congress "establish * * * uniform laws on the subject of bankruptcies throughout the United States."

To protect the value and uniformity of bankruptcy administration, it is respectfully urged that the prayer of the Petitions be granted.

Respectfully submitted,

SIDNEY H. BLOCK,
Attorney for Petitioner.

APPENDIX.

COMMENTS ON RECENT DECISIONS.

BANKRUPTCY—*Title of the Trustee in Bankruptcy to Bankrupt's Interest.*

Under a Trust (Illinois). Dorothea W. Huszagh was the owner of a vested interest under a trust created by the terms of her father's will. In October, 1939, James R. Cardwell, a judgment creditor of Mrs. Huszagh, filed a bill in the Circuit court of Lake county for the purpose of reaching that interest. The Circuit court, holding that the trust in question was not a spendthrift trust, entered a decree of sale. Within a week following the decree the litigants reached an agreement that Cardwell would, at the sale, bid the full amount of the judgment in return for Mrs. Huszagh's forebearance to appeal. Pursuant to this agreement, Cardwell bid the full amount of the judgment at the master's sale thereafter held, and became the successful bidder and owner of the interest in the trust. A satisfaction piece was filed of record.

About a year later Mrs. Huszagh was adjudicated bankrupt on her voluntary petition. On his appointment as trustee in bankruptcy, Fred E. Hummel filed a bill of review in the Circuit court of Lake county, seeking to have the court set aside the previous decrees and to have the bankrupt restored to her former status (as owner of the interest in the trust). The bill was based on the ground that there was error apparent on the face of the record because the decrees were in contravention to § 49 of the Illinois Chancery Act[1] which provides that after an execu-

1. Sec. 49, Ch. 22, Ill. Rev. Stats.

tion has been issued discovery may be compelled against the debtor as to, and the court shall have power to decree satisfaction out of * * * "property, money or things in action, belonging to the defendant, or held in trust for him * * * except when such trust has, in good faith, been created by * * * some person other than the defendant himself * * *." This statute has been interpreted by the Illinois Supreme court to permit voluntary transfer by the beneficiary in absence of an express restraint against same in trust instrument.[2]

Mrs. Huszagh, Cardwell, and the trustee under the will were named as defendants. All filed answers and Mrs. Huszagh filed a counterclaim. The Circuit court dismissed both the bill of review and the counterclaim. On appeal, the Appellate court of the Second district reversed the order dismissing the bill of review and issued an order of remandment, directing that the sale be vacated and that Mrs. Huszagh be restored as the beneficiary under the trust. On appeal to the Supreme court, *Held* reversed. The court held the contention that the trust was controlled by § 49 of the Chancery Act to be correct since the trust in question had been created by another than the bankrupt, and admitted that there was error apparent on the face of the record. It concluded, however, that the interest of the trustee in bankruptcy was limited to the interest which a judgment creditor could have acquired and no more,[3] and

2. In *Binns* v. *LaForge*, 191 Ill. 598 (1901) the S. Ct. of Ill., interpreting this section of the Chancery Act, stated that the statute was not designed to protect the trust from voluntary alienation of the *cestui que* trust. Apparently its purpose is to protect such trusts as herein considered from being reached by judgment creditors.

3. The court cited, in support of this holding, section 70, sub. c, of the Bankruptcy Act. Examination of this portion of the act reveals that it grants to the trustee the rights, remedies, and powers of a judgment creditor, but nothing in the language therein appears to constitute a limitation to such right and no more. In apparently the only other Illinois decision interpreting this portion of the subsection its purpose as stated was to prevent a defense that the bankrupt was in *pari delicto* to the party sued and to give the trustee greater powers than the bankrupt had held. *Chatz* v. *Bloom*, 322 Ill. App. 435, 54 N. E. 2d 889 (1944).

held that since the judgment creditor, under the terms of § 49 of the Chancery Act, was without power to reach the interest, the trustee in bankruptcy was likewise limited and could not be preferred over the judgment creditor. The counterclaim was dismissed on grounds of estoppel because of the agreement entered into by the judgment creditor and the judgment debtor, which had been performed by the judgment creditor. *Hummel* v. *Cardwell*, 390 Ill. 526, 62 N. E. (2d) 433 (1945).

The dismissal of the bill is not without adequate support, for the title of the trustee in bankruptcy is generally limited to that which the bankrupt held at the time of the filing of the petition[4] and since the court determined that the bankrupt herself could not claim any interest under the trust, because of her agreement with the judgment creditor, there was no title in the bankrupt to which the trustee could succeed. Also, though the trustee may set aside any preferential judgments under § 60 of the Bankruptcy Act, action to do so must be instituted within four months from the date of the judgment or date of the record thereof, and in this case action by the trustee was barred by this limitation.

However, it would appear that the basis of the decision is in fact the court's interpretation of the Bankruptcy Act to the effect that where a judgment creditor is denied the right of satisfaction of execution on property held in trust for the bankrupt or, in other words, where such property is not subject to levy and sale under judicial process, it does not pass to the trustee in bankruptcy, no consideration being given to whether the property was or was not subject to voluntary alienation by the bankrupt. This view is not supported by either the terms of the Bankruptcy Act or the cases on the question.

4. U.S.C. Title 11, Sec. 60. Also see Decennial Digests, Bankruptcy, Key 151.

The test of whether or not property of the bankrupt passes to the trustee is found in § 70 of the Bankruptcy Act.[5] Subsection a, (5) of § 70 provides that "The trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt to all * * * property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him or otherwise seized, impounded, or sequestered." This clear language of the statute itself indicates that the test is *twofold*, and if the property meets *either* the requirement of being subject to levy and sale under judicial process *or* the requirement of being subject to voluntary alienation by the bankrupt, then the title thereto passes to the trustee.

The same view is found in the decisions. In *In re Landis*,[6] a federal decision on a case arising in Illinois, the court held that title to an interest in land, assumed to be a contingent remainder, which was not, under the laws of Illinois, subject to levy and sale under judicial process, nevertheless passed to the trustee of the bankrupt by reason of the fact that it was transferable by him. The opinion states clearly that under § 70, a, (5) of the Bankruptcy Act two classes of property were set up; first, property which is transferable, and second, property which is subject to levy and sale under judicial process. In *Suskin & Berry* v. *Rumley*,[7] an earlier federal decision, the court, though deciding that the interest of the bankrupt did not pass to the trustee, based its decision on two separate and distinct reasons; the one, that the property was not subject to levy and sale under judicial process, the other, that it was not transferable by the bankrupt. In a N. Y. case where the bankrupt was the beneficiary of a

5. U.S.C. Title 11, Sec. 110. See also U.S.C.A. Title 11, Sec. 110, note 191 and cases cited therein.

6. 41 F. 2d 700 (1930) (see also 138 A.L.R. 1350).

7. 37 F. 2d 304, 68 A.L.R. 769 (1930).

testamentary annuity out of a trust fund it was held that the right of the beneficiary was property which he could assign and which could be followed by his creditors and therefore passed to his trustee in bankruptcy.[8]

Indeed, other of the cases would indicate, if considered individually, that transferability alone is the test. In *Pollack* v. *Meyer Bros. Drug Co.*,[9] the court declared that the question of whether the property was subject to seizure was not the test, and pointed out that many equitable interests are not subject to seizure or execution, but being transferable pass to the trustee in bankruptcy, citing as examples thereof, a seat on a stock exchange,[10] liquor license,[11] and certain insurance policies.[12] In *In re Wright*[13] the question of whether a bankrupt's interest in commissions on renewal premiums to which he was entitled under contract was property which passed to the trustee was decided solely on the fact that it was transferable.[14]

Patrick v. *Beatty*,[15] a North Carolina case is a very good example of the test as it might well have been applied by the Illinois court in arriving at the proper interpretation of the act. In that case it was held that the bankrupt's interest in an estate in trust could not have been sold upon judicial sale under the laws of North Carolina, since it was a spendthrift trust so far as creditors were concerned, yet because it was alienable by the beneficiary it passed to the trustee in bankruptcy.

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8. *In re Burtis*, 188 F. 527 (1911). See also U.S.C.A., Title 11, sec. 110, note 194 and cases cited therein.

9. 233 F. 861, 147 C.C.A. 535 (1916).

10. *Page* v. *Edmonds*, 187 U.S. 596, 23 S. Ct. 200, 47 L. Ed. 318 (1903).

11. *Fisher* v. *Cushman*, 103 F. 860, 43 C.C.A. 51, L.R.A. 292 (1900).

12. *In re Coleman*, 136 F. 818, 69 C.C.A. 496 (1905). *In re White*, 174 F. 333, 98 C.C.A. 205, 26 L.R.A. (N.S.) 451 (1909).

13. 157 F. 544, 18 L.R.A. (N.S.) 193 (1907).

14. See *Horton* v. *Moore*, 110 F. 2d 189 (1940) where it is said that that transferability is the test under the plain language of the act. In this case a contingent remainder in a trust passed to trustee because it was transferable under the laws of Michigan, the court adding that even a possibility coupled with an interest may pass since under local laws they are assignable.

15. 202 N.C. 454, 163 S. E. 572, 20 Am. Bankr. Rep. (N.S.) 673 (1932).

In *Martin* v. *McCune*,[16] decided by the Illinois Supreme court in 1925, the vested interest of the bankrupt under a trust passed to the trustee in bankruptcy, the court in that case apparently finding no necessity for any interpretation of the Bankruptcy Act such as given in *Hummel* v. *Cardwell*.

In reaching its decision in *Hummel* v. *Cardwell* the court relied also on the proposition that state law controls in the matter of interpretation of property rights. That is certainly the correct rule but the question on which the state Beloit were not unreasonable. The include the rates of the law is held to be controlling is that of whether or not the property is, under the local law, subject to seizure or transferable.[17] That state law controls in the interpretation of property rights does not *affect* the test, but is rather in substance a statement of the test.[18]

The court's interpretation of the Bankruptcy Act entirely ignores the question of voluntary transferability as a test of the problem whether property of the bankrupt passes to the trustee. Unless both tests above stated are applied and it is determined that the property is *neither* subject to levy and sale under judicial process *nor* subject to alienation by the bankrupt, a conclusion to the effect that the property does not pass is not in accord with either the statute itself or with the decisions. The application of but half the test is not a user of the whole of the law and here has resulted in a misinterpretation of it. As said by Lindley, *J.*, in *In re Miner*,[19] in commenting on the interpretation of the act, "The proper interpretation of the act cannot be reached by the consideration of isolated sentences or paragraphs or even isolated sections; but the act must be considered as one comprehensive declaration of intention by Congress."

16. 318 Ill. 585 (1925).

17. *In re Brand's Trust*, 281 N.Y.S. 548, 156 Misc. 312 (1935).

18. See *Miller* v. *Miller*, 31 S.E. 2d 844 (1944) (where any interest in property is transferable under local law, including a beneficiary's interest in a trust, it passes to his trustee for the benefit of creditors).

19. 9 F. Supp. 1 (1934).